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In The

Supreme Court of the United States

October Term, 1984

ESTHER GARCIA MANAS PEREZ, as Administratrix of the Estate of Rosa Maria Manas Y Pineiro, Deceased,

Petitioner,

vs.

THE CHASE MANHATTAN BANK, N.A.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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QUESTION PRESENTED

Does the federal act of state doctrine require a court in the United States to give effect to a foreign confiscation of a debt obligation owed by a United States bank to a customer, so as to extinguish the bank's obligation, where the bank agreed to pay the obligation, at the customer's option, wherever the bank maintains a branch office, including offices in the United States and in the confiscating country where the transaction was initiated?

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No.

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ESTHER GARCIA MANAS PEREZ, as Administratrix of the Estate of Rosa Maria Manas Y Pineiro, Deceased,

Petitioner,

vs.

THE CHASE MANHATTAN BANK, N.A.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

The petitioner, Esther Garcia Manas Perez, as Administratrix of the Estate of Rosa Maria Manas Y Pineiro, deceased ("plaintiff"), respectfully petitions for a writ of certiorari to review the judgment and decision of the Court of Appeals of the State of New York entered in this proceeding on March 30, 1984 (A 1a, 22a).[1] Such judgment and decision reversed the judgment and

1. Numbers in parentheses prefixed by the letter "A" refer to pages of the appendix to this petition. Numbers in parentheses prefixed by the letter "R" refer to pages of the record in the state court.

decision of the Appellate Division, First Judicial Department, of the Supreme Court of the State of New York (A 24a), and reinstated the judgment of the Trial Court, Supreme Court, New York County (A 41a) in favor of respondent The Chase Manhattan Bank, N.A. ("Chase").

OPINIONS BELOW

The opinion of the Court of Appeals (A 1a) is reported at 61 N.Y. 2d 460, 474 N.Y.S. 2d 689 (1984). The opinion of the Appellate Division, First Department (A 24a) is reported at 93 A.D. 2d 402, 463 N.Y.S. 2d 764 (1983). The opinion of the Supreme Court, New York County (A 41a) is reported at 106 Misc. 2d 660, 434 N.Y.S. 2d 868 (1980).

JURISDICTION

The judgment and decision of the New York Court of Appeals was entered on March 30, 1984. On April 11, 1984, upon remittitur from the Court of Appeals (A 22a), the Supreme Court, New York County, entered final judgment. A timely petition for rehearing was denied by the Court of Appeals on June 7, 1984 (A 55a). This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

FEDERAL LAW INVOLVED

The Court of Appeals' decision was based on the act of state doctrine which this Court has held is exclusively a matter of federal law and has "constitutional underpinnings." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

STATEMENT OF THE CASE

The case involves the effect to be given by United States courts under the act of state doctrine to a Cuban confiscation in September 1959 after the success of Castro's revolution, which was directed at obligations of Chase to plaintiff under five certificates of deposit aggregating about $225,000. The certificates were issued in Cuba by Chase to plaintiff in 1958, during the months preceding Castro's takeover and, as found by the jury in its special verdict after a trial, were payable by Chase in United States dollars upon presentation wherever Chase had an office, including offices in the United States and in Cuba. The case thus directly presents the important issue as to how the act of state doctrine is to be applied to debt obligations payable both in this country and abroad, which this Court has not heretofore addressed. The same issue was recently presented to the United States Court of Appeals for the Second Circuit, which adopted a different approach and reached a different result in a case which is factually indistinguishable. *Garcia v. The Chase Manhattan Bank, N.A.*, 735 F.2d 645 (2d Cir. Mar. 28, 1984, as amended June 20, 1984), *aff'g*, 77 Civ. 5340 (S.D.N.Y. June 7, 1983).

Facts

Chase operated various branch offices in Cuba from 1925 until its Cuban branches were nationalized in 1960. During the 1950's Chase actively solicited business from the Cuban community by advertising in prominent Cuban publications that it offered worldwide banking facilities (R 308-12; 917-18).

Plaintiff was born in Cuba, where she married and raised her family (R 21-22). Her husband, in addition to holding positions in private industry, was Minister of Communications in the Batista government in 1958 (R 63-64, 76). As Castro's forces expanded their activities, plaintiff and her family became apprehensive as to their position in the event they were required to flee Cuba.

Plaintiff and her husband testified that in the early part of 1958 they had a number of discussions with the chief operating officer ("Chase's officer") of Chase's branch in Marianao, a suburb of Havana, during which they told Chase's officer that they were concerned about the politicial situation in Cuba and the possibility that plaintiff would be required to flee the country, and that they were seeking a bank obligation that could be collected in the United States as that would be the easiest way to get funds out of Cuba (R 20-77, 109-17). They further testified that Chase's officer told them that Chase was a worldwide bank and that its certificates of deposit were payable wherever Chase had an office, with particular and primary emphasis on plaintiff's right to redeem the certificates in the United States in dollars. (*Id.*) Chase's officer denied any such discussions (R 299-332).

Between May 26 and December 9, 1958 plaintiff on four occasions went to Chase's Marianao branch and purchased the five certificates of deposit, the transactions being processed by Chase's officer. The translation of one of the certificates that was accepted at the trial is set forth in the Appendix (A 51a).[2]

When Castro entered Havana on January 1, 1959 plaintiff's husband obtained refuge in the Colombian Embassy compound in that city (R 52). Plaintiff, then in her forties, was in the advanced stages of pregnancy on that date, and she gave birth to a daughter on March 5, 1959 (R 21, 52-53). About a week later, on March 13, 1959, plaintiff's husband fled to Colombia (R 52). About three months after giving birth, sometime in the Spring of 1959, plaintiff fled Cuba and joined her husband in Colombia, where she remained for about a year (R 55, 111-12). Plaintiff returned to Cuba from Colombia for about four months

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2. The translation set forth in the Appellate Division's decision (A 26a) is the translation submitted by Chase on its initial summary judgment motion and is incorrect in several respects.

in 1960 (her infant daughter had remained in Cuba), after which she joined her husband in Mexico where he had received asylum (R 54-56). After living one year in Mexico, plaintiff and her husband moved permanently to the United States, their infant daughter joining them when she was nine years old (R 56, 110-11).[3]

On February 28, 1959, Cuban Law 78 was adopted which established a Ministry for the Recovery of Misappropriated Property. The Ministry was given extraordinary powers to seize property representing the "proceeds of unjust enrichments" from the "National Wealth" obtained "under the cover of the Public Power." (R 945, 41a-51a).

The only evidence offered at the trial by Chase relating to action by the Cuban government to confiscate plaintiff's property, and the turnover by Chase of sums to the Cuban government, was an internal letter, dated September 10, 1959, from one Chase employee in Havana to another in New York. A copy of that letter is set forth in the Appendix (A 52a). The letter states that the "Ministry for Recovery of Misapplied Governmental Funds" (sic) had instructed Chase to "close" a number of "accounts" and to remit the proceeds to the Ministry, and that Chase's Cuban branches had complied. Plaintiff's five certificates of deposit are referred to in the September 10, 1959 letter as being affected by the Ministry's action.

On September 17, 1960, pursuant to a Law of Nationalization which was adopted on July 6, 1960, Chase's Cuban branches were nationalized (R 948).

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3. As found by the Court of Appeals, plaintiff was not in Cuba at the time of the September 1959 confiscation: "Manas [plaintiff] remained in Cuba for the first half of 1959, visited her husband in Colombia, returned to Cuba for approximately four months in 1960, joined her husband in Mexico, and both later relocated to the United States." (A 2a-3a). Plaintiff died after the trial and pending the appeal to the Appellate Division at which time her eldest daughter was substituted as her Administratrix.

Proceedings and Opinions Below

The proceedings prior to trial are described and cited in the opinions below (A 3a-4a, 27a, 42a-43a).

Each of the decisions below turned on the applicability of the act of state doctrine: "The Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government. . . ." *Sabbatino, supra,* 376 U.S. 398, 428.

At the conclusion of the trial in New York Supreme Court, the trial judge submitted three questions to the jury for a special verdict with respect to (1) the intention of the parties as to currency of repayment; (2) the intention of the parties as to place of repayment; and (3) whether a confiscation did in fact occur. The jury found that the certificates were repayable in United States dollars; that the certificates could be presented for payment at any Chase branch in the world, including New York and Marianao, Cuba; and that a confiscation did in fact occur.

The trial court upheld Chase's act of state defense on the basis that the debt had a situs in Cuba where it was payable and where Chase had an operating branch at the time of the confiscation, and that the doctrine was applicable notwithstanding the fact that the debt was also payable at Chase's home office in the United States.

The Appellate Division unanimously reversed that decision, determining that the act of state doctrine should be applied to a debt obligation only when that "obligation is found to be situated *exclusively* within the foreign state" which acts to confiscate it, and that the obligation of Chase to redeem the certificates in New York upon presentment should be enforced (A 33a).

The Court of Appeals, in a 5-2 decision, reversed. The majority viewed Chase's presence in Cuba, which was one of the places for payment of the debt, as decisive:

> "We must first determine whether the property taken by the Cuban government — here, Chase's debt to Manas — was within its borders. For purposes of the Act of State doctrine, a debt is located within a foreign State when that State has the power to enforce or collect it. Since *Harris v. Balk,* 198 U.S. 215, the power to enforce or collect a debt has been dependent on the presence of the debtor. If the debtor is present in the foreign State and the debt is payable there, the foreign sovereign then has power to enforce or collect it, and a confiscation of that debt amounts to a seizure of property within that sovereign's borders." (A 7a-8a; citations omitted.)

The majority dismissed the fact that Chase is domiciled in the United States, where the debt was also payable. It wrote (A 9a):

> "The fact that Chase's debt to Manas was not exclusively payable in Cuba, but could in addition have been paid in other countries, does not affect this result."
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> * * *
>
> "Only when a debt or other obligation is not payable at all in the confiscating State would the Act of State doctrine be inapplicable. In such situations, the foreign sovereign has no power to enforce or collect the debt."

The dissenting opinion noted that this Court has not decided if and how the act of state doctrine should be applied to a debt

obligation, and that the cases relied upon by the majority all involved situations where the "debtor was not present in the confiscating country or the debt was held not to be payable there." (A 17a). The dissent observed that the "situs" or "location" of a debt has been held to be in different places for different purposes based on the policy considerations involved in the particular area of law for which such determination is to be made. Judge Wachtler contended that the situs approach adopted by the majority led to an unwarranted expansion of the act of state doctrine and produced an unacceptable result:

> "In sum, the cases employing the rule that an intangible is located where the debtor can be found do not establish a fixed rule of law under the Act of State doctrine and can only be so construed if the policy nature of the decisions is ignored. What is more significant is that the court's decision to employ the rule in the prior cases served to 'place' the asset within a single country. This is apparently the first case in which the rule has been applied to the Act of State doctrine in such a way as to expose deposits made in an American bank, payable in United States currency at any of its branches worldwide, to confiscation by any country in which the bank maintains a branch office." (A 18a-19a; citation omitted).

The dissent, after further noting that this Court's recent plurality decisions regarding the act of state doctrine have questioned many of the premises on which it rests and have limited its application (A 19a), would have ignored legal fictions relating to location of the debt and focused instead on the question as to who, Chase or plaintiff, should bear the loss resulting from Cuba's undoubted power to require Chase's Cuban branches to pay over an amount equal to the certificates (A 20a-21a). In that respect, it was the

view of the dissent that plaintiff should be permitted to recover on the certificates as the essence of the transaction was that Chase safeguard plaintiff's funds in a revolutionary situation. (*Id.*)

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT. APPLICATION OF THE ACT OF STATE DOCTRINE TO DEBT OBLIGATIONS IS A SUBJECT OF CONFUSION AND INCONSISTENT DECISIONS ON THE PART OF LOWER COURTS. THE DECISION BELOW HAS EXPANDED THE DOCTRINE WELL BEYOND ITS ORIGINAL RATIONALE.

This Court has not addressed the application of the act of state doctrine to debt obligations in any of its decisions, or, specifically, the question of when a foreign government's taking of a debt or variance of its terms must be recognized by United States courts.[4] The problems that arise in such application are important, and are becoming increasingly so as foreign nations take various actions to relieve or restrict the payment of debt obligations which are owed by the governments themselves, or by banks and other entities, foreign or domestic, operating within the territory of the foreign government. The lower court decisions, including the decision of the Court of Appeals herein, have lacked a coherent rationale and are inconsistent, conceptually and in result, with other decisions in comparable if not identical situations.

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4. *Alfred Dunhill of London v. Republic of Cuba,* 425 U.S. 682 (1976) involved a debt obligation, but the Court's decision was not based on the issue of when conceded confiscatory action with respect to such an obligation must be accepted by our courts.

In this case, foreign confiscatory action has been given direct extraterritorial effect[5] so as to extinguish a debt obligation payable in the United States in United States dollars, at the option of the holder. That result, we submit, has extended the act of state doctrine beyond its original limits, and has given unwarranted priority to the restraining aspects of the doctrine, while wholly ignoring the aspects of the doctrine which relate to this country's sovereign right to determine matters relating to obligations payable within its borders. The decision below represents no more nor less than an abdication by a United States court of its duty to determine the merits of a controversy relating to an agreement to be performed in this country.

The decision below is also inconsistent with a contemporaneous decision of the United States Court of Appeals for the Second Circuit in a case factually indistinguishable from this one involving identical certificates of deposit issued in Cuba by Chase at the same time and under the same circumstances. *Garcia v. The Chase Manhattan Bank, N.A., supra,* p. 3. Furthermore, recent decisions of the District Court for the Southern District of New York and the Second Circuit involving the doctrine have produced widely disparate analyses and results. *Allied Bank International v. Banco Credito Agricola de Cartago,* 733 F.2d 23 (2d Cir. April 23, 1984, *rehearing granted* July 3, 1984), *aff'g,* 566 F. Supp. 1440 (S.D.N.Y. 1983); *Libra Bank Ltd. v. Banco Nacional de Costa Rica, S.A.* 570 F. Supp. 870 (S.D.N.Y. 1983). Those decisions are discussed below.

The importance of the issues involved is underlined by the fact that major banking and international trade associations, and,

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5. Indirect extraterritorial effect is given, of course, to the confiscation of physical property abroad, which is later brought to the United States, as in *Oetjen v. Central Leather Co.,* 246 U.S. 297 (1918); and where foreign actions are recognized on the basis of comity.

indeed, the United States, have variously filed *amicus curiae* briefs in this case below, and in the *Garcia* and *Allied Bank* cases.

The need for the direction of the Court in this important area of federal law is made evident by a brief review of the considerations at issue and the principal cases in point.

Situs, and Policy Considerations

This Court has observed that "debts have no actual territorial situs" (*Farmers' Loan & Trust Co. v. State of Minnesota,* 280 U.S. 204, 211 [1930]), and that "since they are without physical characteristics, can have no location in space". *First Bank Stock Corporation v. State of Minnesota,* 301 U.S. 234, 240 (1937). As stated by Judge Cardozo, citing decisions of this Court:

> "The situs of intangibles is in truth a legal fiction, but there are times when justice or convenience requires that a legal situs be ascribed to them. The locality selected is for some purposes, the domicile of the creditor; for others, the domicile or place of business of the debtor, the place, that is to say, where the obligation was created or was meant to be discharged; for others, any place where the debtor can be found. At the root of the selection is generally a common sense appraisal of the requirements of justice and convenience in particular conditions."

Severnoe Securities Corp. v. London & Lancashire Insurance Co., 255 N.Y. 120, 123-24 (1931) (citations omitted).

The stated policy of the act of state doctrine is to preclude our courts from interfering with the executive branch's conduct of foreign policy. To that end the Court has held that the validity

of the taking by a foreign government of property within its borders cannot be questioned in our courts as that could be taken as an affront by the foreign government. *Sabbatino, supra,* 376 U.S. at 423, 427-28.

The territorial limitations of the doctrine, however, have been considered inherent in the doctrine itself, and the doctrine is not applicable where a foreign government seeks to take property located within the United States, without regard to the impact that it may have on our foreign relations. *Republic of Iraq v. First National City Bank,* 353 F.2d 47 (2d Cir. 1965), *cert. denied,* 382 U.S. 1027 (1966). In *Republic of Iraq,* the court reviewed at length the historic policy of this country not to recognize foreign confiscatory acts seeking to affect property located in the United States.

Given the competing policy considerations which pivot on the territorial dimensions of the doctrine, the determination of an appropriate legal rationale for application of the doctrine to debt obligations has proven to be elusive, and has led to confusion and disparate results in the lower courts.

Power Over the Debtor

The initial cases applying the doctrine to debt obligations essentially applied a rule similar to that set forth in *Harris v. Balk,* 198 U.S. 215 (1905): The "property" comprising a debt obligation is located where the debtor is situated as the exercise of governmental power over the debtor is the method by which a debt obligation is converted into cash. *Republic of Iraq, supra; Tabacalero Severiano Jorge, S.A. v. Standard Cigar Co.,* 392 F.2d 706 (5th Cir.), *cert. denied,* 393 U.S. 924 (1968); *Menendez v. Saks and Co.,* 485 F.2d 1355 (2d Cir. 1973), *rev'd in part sub nom., Alfred Dunhill of London, Inc. v. Republic of Cuba,* 425

U.S. 682 (1976);[6] *United Bank, Ltd. v. Cosmic International, Inc.*, 542 F.2d 868 (2d Cir. 1976). That rule was considered in the above cited cases to be consistent with the restraining policy aspects of the act of state doctrine as the debtors in each of the cases had no presence in the foreign confiscatory nation. Under such circumstances, the possibility of offense to the foreign governments was considered minimal, and it was not difficult to conclude that the debts were not "property" located within the foreign government's territory, but were located in the United States, as the debts could only be enforced by the foreign governments by resort to our courts.

The courts in the above cases, however, realized that where the debtor had a presence in the foreign country as well as in the United States different considerations would come into play and that a presence or jurisdictional test would not necessarily be appropriate. Judge Friendly expressly left that question open in *Republic of Iraq*, where he stated: "[I]n the absence of any showing that Irving Trust [debtor] had an office in Iraq or would be in any way answerable to its courts, we need not consider whether [our] conclusion would differ if it did." 353 F.2d at 47. To the same effect, see *Menendez, supra*, 485 F.2d at 1365.[7]

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6. This Court denied *certiorari* as to the ruling in *Menendez* concerning location of the debt for act of state purposes. *See Alfred Dunhill, supra*, 425 U.S. at 691 fn. 6.

7. The stalemate produced by a presence or jurisdictional test where the debtor is in both jurisdictions is apparent and has been noted by commentators. Heininger, *Liability of U.S. Banks for Deposits Placed in their Foreign Branches*, Law and Policy in International Business, Vol. 11, No. 3 pp. 903, 1033-34 (1979); Lowenfeld, *In Search of the Intangible: A Comment on Shaffer v. Heitner*, 53 N.Y.U.L. Rev. 102, 123 (1978).

Cases in Which the Debtor Had a Presence In and Was Subject to the Jurisdiction of the Foreign Country as Well as the United States

Prior to this case, the New York Court of Appeals decided two relevant cases which involved application of the act of state doctrine to foreign confiscatory action where the debtor was present in and subject to the jurisdiction of both the foreign country and New York courts. *J. Zeevi & Sons v. Grindleys Bank (Uganda) Ltd.*, 37 N.Y. 2d 220, 371 N.Y.S. 2d 892, *cert. denied*, 423 U.S. 866 (1975); *Weston Banking Corp. v. Turkiye Garanti Bankasi*, 47 N.Y. 2d 315, 456 N.Y.S. 2d 684 (1982). In both cases, the Court of Appeals viewed the debt obligation as being payable only in New York.[8] In both cases, the Court of Appeals held that the act of state doctrine was not applicable on the ground that the confiscating country did not have the power to enforce a debt payable in New York, despite the presence of the debtors in the foreign county. While those cases may have been correctly decided, it is difficult to justify the decisions on the basis that the foreign governments did not have the power to enforce the debts against debtors located within their borders, whether or not the debts were by their terms payable there. Similarly, in this case the Court of Appeals has held that the plaintiff could prevail only if the debt was not payable in Cuba since the Cuban government could not under that circumstance enforce the debt.

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8. A reading of the letter of credit involved in *Zeevi*, which is set forth in the opinion in that case, plainly shows that it could have been drawn on in Uganda as well as in New York, and the court assumed as much in its opinion; and in *Weston*, the court pointed out that the promissory note, although providing for payment in New York, also expressly gave the holder the option of bringing suit in Turkey. As the majority of the Court of Appeals in its opinion herein has treated those cases as involving an obligation that was not also payable in the foreign country (A 9a), we note the discrepancy only to point up the difficulty that the New York Court of Appeals has had in application of the act of state doctrine to debts on a consistent basis.

It is evident, however, particularly when the later nationalization of Chase's Cuban branches is considered, that Cuba had power to enforce its will over Chase's branches and to command Chase to turn over funds equal to sums owed by Chase to plaintiff no matter where payable.

In none of its decisions has the New York Court of Appeals attempted to explain how the place of payment of a debt, whether in single or multiple places, relates to a *Harris v. Balk* jurisdictional test which is grounded on governmental power over the person of the debtor as a means of enforcing the debt. The fact is that place of payment of debt as a determining factor presents considerations different than those relating to power over a debtor. The failure of the Court of Appeals to examine those considerations led it to the untenable conclusion, pointed out by the dissent (*supra*, p. 8), that where a debt is payable in more than one place, application of the act of state doctrine requires our courts to recognize any foreign action to take or affect the debt so long as the debtor was within the confiscating country's territory and the debt was payable there. The decision herein thus produces a first-come first-served result, in a race to the bank. The majority's attempt, in a footnote at the end of its opinion, to limit its ruling to takings only by the country where the transaction was initiated is no more than an afterthought which is not supported by the jurisdictional rationale adopted in its opinion.

The confusion and uncertainty in application of the doctrine is further shown by a brief review of recent federal decisions concerning Costa Rican regulations adopted in 1981 which prohibited the payment of external debts in foreign currencies. Those regulations led to two law suits brought in the Southern District of New York by holders of loan obligations undertaken by banks domiciled in Costa Rica, which obligations were payable

in United States dollars in New York.[9] The Costa Rican banks asserted act of state defenses in both cases, with widely disparate results.

In the *Libra* case, *supra*, p. 10, 570 F. Supp. 970, the district judge, in an opinion which comprehensively reviewed the cases we have cited above, rejected the defense. After reviewing the policy considerations underlying the act of state doctrine, and the jurisdictional approach to situs (which the court concluded led to an impasse), the court held that the situs of the debt was in New York as that location was the focal point of the agreement between the parties as to repayment.[10] In that respect we note that, notwithstanding its conclusion that the debt in this case had a situs in Cuba as well as in the United States, the majority of the Court of Appeals expressly found that plaintiff "bargained for and received the right to collect from Chase at any of its

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9. Courts have had, disregarding the various rationales of the decisions, little difficulty in giving effect to foreign confiscations of debts which were payable only in the county so acting, despite the presence of the debtor in both the United States and the foreign country. *Braka v. Bancomer, S.A.*, 83 Civ. 1727 (S.D.N.Y. June 20, 1984); *Trujillo-M v. Bank of Nova Scotia*, 51 Misc. 2d 689, 273 N.Y.S. 2d 700 (Sup. Ct. N.Y. Co. 1966), *aff'd*, 29 A.D.2d 847, 289 N.Y.S.2d 389 (1st Dep't), *cert. denied*, 393 U.S. 982 (1968).

10. The *Libra* case is suggestive of analogy to federal conflict of law rules in the application of the act of state doctrine to debt obligations. *See Sabbatino, supra*, 376 U.S. at 425-26; *Republic of Iraq*, 353 F.2d at 50, 53, to the effect that uniform federal rules are essential under the doctrine. In "most civilized countries legality of performance of a contract depends on the law of the place of performance", *Anglo Continetale Treuhand, A.G. v. St. Louis S.W. Ry. Co.*, 81 F.2d 11, 12 (2d Cir.) (L. Hand, J.), *cert. denied*, 298 U.S. 655 (1936); and where a creditor has an election to demand payment in several places, the law of the place that is chosen governs. *Menendez, supra*, 485 F.2d at 1366. As this Court suggested in *Sabbatino*, where a rule is generally accepted as a matter of international law, "the weaker the justification for exclusivity in the political branches". 376 U.S. at 428.

branches throughout the world." (A 9a). Indeed, as the last certificate of deposit herein was issued only three weeks before Castro entered Havana, there is no basis whatever for any conclusion that presentation in Cuba was the focal point for repayment.

The district court in the other Costa Rican case, *Allied Bank, supra*, p. 10, 566 F. Supp. 1440, took a completely different view of the identical situation and upheld the act of state defense. The district judge, without considering any factors relating to situs of property, held that judicial enforcement of the debt would require the Costa Rican banks to violate the directives of their government which could embarrass this country's relations with Costa Rica, and, accordingly, the act of state doctrine barred such enforcement.

The *Allied Bank* case was appealed to the Second Circuit, which took a third view. 733 F.2d 23 (2d Cir. March 28, 1984, *rehearing granted* July 3, 1984), *supra*. That court decided that the location of the debt for act of state purposes was immaterial, since the Costa Rican regulations, in that they were consistent with our domestic reorganization procedures under the Bankruptcy Code, were entitled to recognition as a matter of comity. Following that decision, the plaintiff therein moved for a rehearing with the suggestion of an *en banc* rehearing, which petition was supported by several *amicus curiae* briefs, including one filed by the United States. A rehearing has been ordered before the panel which decided the appeal. Regardless of the outcome of the rehearing, the confusion of lower courts in application of the act of state doctrine to debt obligations is evident.

The Virtually Identical *Garcia* Case

As this case proceeded in New York's courts, a virtually identical case proceeded in tandem in the federal courts. *Garcia v. The Chase Manhattan Bank, N.A., supra*, p. 10, *aff'g*, 77 Civ.

5340 (S.D.N.Y. June 7, 1983). *Garcia* involved a form of Chase certificate of deposit identical to those in this case issued by another Cuban branch to another member of the Batista government under circumstances and for purposes indistinguishable from those in this case. The jury returned a special verdict therein finding that the certificates were payable in United States dollars wherever Chase had a branch, in Cuba as well as in the United States, and that Cuba acted to confiscate the debt. The Court of Appeals for the Second Circuit affirmed (2-1) the trial court's decision in favor of plaintiff. In its initial opinion (March 28, 1984), the Second Circuit majority, after discussing the act of state doctrine, rejected Chase's defense on the basis that "the parties understood that the debt did not have its situs" in Cuba. Slip Op., p. 2607. The court emphasized that the legality of the action of the Cuban government was not being challenged, but: "We are simply resolving a private dispute between an American bank and one of its depositors. The result we reach will have no international repercussions." Slip Op., p. 2609. The dissenter would have accepted Chase's act of state defense on the basis that the debt had one of its situses in Cuba.

The Second Circuit's decision in *Garcia* was filed two days before the decision herein by the New York Court of Appeals, which noted but did not comment on it (A 9a-10a). Indeed, the briefs in both cases were presented to each court while the appeals were pending.

After the *Garcia* decision Chase, supported by an *amicus curiae* brief filed by the New York Clearing House Association, petitioned for rehearing, with suggestion for an *en banc* rehearing, on the basis that this and the *Garcia* cases were factually indistinguishable, and that the decisions of the two principal courts in the United States concerned with international banking disputes were inconsistent. That petition was pending at the same time

the petition for rehearing in the *Allied Bank* case was pending. The petition in *Garcia* was denied after the Second Circuit issued an Order Amending Opinion, dated June 20, 1984, in which the majority eliminated the act of state "situs" basis of its decision, and focused, instead, on what it found to be Chase's agreement to safeguard plaintiff's funds regardless of whether the debt had a situs in Cuba. The reasoning of the amended majority opinion in *Garcia* is essentially similar to the reasoning in the dissenting opinion in this case.

While a tenuous distinction can perhaps be drawn between this and the *Garcia* cases, the decisions are in obvious conflict.[11] The obligations of Chase under identical instruments issued under the same circumstances have been treated differently by the two courts, each of which took different approaches. In weighing the applicability of the act of state doctrine, the Second Circuit directed its attention to the intention of the agreement between the parties, as did the District Court in *Libra, supra,* p. 16, while the New York Court of Appeals took a mechanistic jurisdictional approach.

While basing its decision on the situs of the debt in Cuba, the opinion below mentioned several times that plaintiff was a Cuban national. It did not specify the significance of that conclusion, except with respect to the inapplicability of the Hickenlooper Amendment (A 11a). However, in considering the recognition to be afforded to Cuban post-revolutionary decrees to Cubans who left Cuban territory, federal courts have made it plain that recognition cannot be based on the fact of nationality or former nationality: Cuban law "depended for [its] effectiveness upon the Cuban government's control over the owners which it

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11. The jury in *Garcia* answered two special inquiries which were not posed in this case, and determined that (1) the parties did not contemplate that Chase would turn over funds to the Cuban government, and (2) Chase was liable to plaintiff.

lost when they fled. . . ." *Menendez, supra,* 485 F.2d at 1366. *See also, Blanco v. Pan-American Life Insurance Co.,* 221 F. Supp. 219, 228 (S.D. Fla. 1963), *aff'd,* 362 F.2d 167 (5th Cir. 1966). Here, the court expressly found that plaintiff had left Cuba prior to the confiscation (*supra,* p. 5) and, indeed, the Cuban government did not purport to act against plaintiff *in personam,* but only with respect to the *res* comprising the debt. Accordingly, the view articulated in *Tabacalero, supra,* p. 12, 392 F.2d at 715, that recognition of foreign confiscatory acts of state is required when "the parties and the *res*" are before the foreign power, is inapplicable and, in fact, was not relied upon by the Court of Appeals majority. Plaintiff here was no more subject to Cuban municipal law on the basis of her nationality than the Cuban expatriates in *Menendez* and *Tabacalero,* and in the other post-Castro cases decided by our courts. Her short return visit to Cuba in 1960, under the circumstances herein (*see* pp. 4-5, *supra)* cannot possibly provide a retroactive basis for the confiscation in 1959, or an independent basis on the ground that she remained subject to Cuban municipal law while she was outside of Cuba attempting to obtain a permanent residence elsewhere in the world. No federal case has so held and, indeed, we note that one of the holders of the certificates in *Garcia* was actually within Cuban territory at the time of the confiscation therein, but none of the judges considered that of consequence.

The important issues of federal law which are raised by this case, we thus submit, should be reviewed by the Court. The decision of the New York Court of Appeals has expanded the act of state doctrine in an unwarranted manner, and the time is appropriate for the expression of this Court's views as to the application of the doctrine to debt obligations.

CONCLUSION

For the reasons above stated, the petition for a writ of certiorari should be granted and upon granting certiorari, the Court should reverse the determination of the Court of Appeals of the State of New York.

Dated: September 5, 1984

Respectfully submitted,

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OPINION OF THE COURT OF APPEALS OF THE STATE OF NEW YORK

61 N.Y.2d 460

Esther G.M. PEREZ, as Administratrix of the Estate of Rosa M. Manas y Pineiro, Deceased,

Respondent-Appellant,

v.

CHASE MANHATTAN BANK, N.A.,

Appellant-Respondent.

Court of Appeals of New York.

March 30, 1984.

OPINION OF THE COURT

KAYE, Judge.

Rosa Manas y Pineiro (Manas), a Cuban national, in 1958 purchased five certificates of deposit from the Marianao, Cuba branch of defendant Chase Manhattan Bank (Chase), and first presented them for payment at Chase's New York office in 1974. The issue on this appeal is whether Chase is excused from payment to Manas, because, in September, 1959, the Cuban government confiscated Manas' accounts and Chase surrendered the funds representing the certificates. Because the certificates were payable

in Cuba and Chase at the time of the confiscation was present there, the Cuban government had the power to enforce and collect Chase's debt to Manas in Cuba, and the Act of State doctrine precludes inquiry by this court into the propriety of a confiscation directed particularly at Manas' assets in Cuba. Having once made payment, Chase is not liable to pay on the certificates of deposit a second time.

Plaintiff, Esther Garcia Manas Perez, is the administratrix of Manas' estate. Manas was the wife of a cabinet minister in the government of Cuba's former leader, General Fulgencio Batista. Between May and December, 1958, she purchased five non-negotiable certificates of deposit, totaling $227,336.47, from Chase by depositing Cuban pesos in that amount at Chase's branch in Marianao, a suburb of Havana. The certificates provided for the payment of 3% interest and had maturity dates between April and June, 1959. Plaintiff claims that political uncertainty in Cuba motivated the purchase of these certificates from a world-wide bank, and that Manas was repeatedly assured by a Chase employee that the certificates could be redeemed wherever Chase had an office, particularly in the United States. However, no place of payment was specified in the certificates. The certificates provided only that payment was to be made in "moneda nacional," or national currency.

When Fidel Castro assumed control on January 1, 1959, Manas' husband took asylum in the Colombian embassy in Havana and thereafter left Cuba for Colombia. Manas remained in Cuba for the first half of 1959, visited her husband in Columbia, returned to Cuba for approximately four months in 1960, joined

her husband in Mexico, and both later relocated to the United States. In that period no effort was made to redeem the certificates.

By Law No. 78 of February 13, 1959, the Cuban government created the Ministry of Recovery of Misappropriated Property "to recover property of any type which has been removed from the National Wealth and obtain the complete restoration of the proceeds of unjust enrichments obtained under the cover of the Public Power." The minister was given the power to conduct investigations, freeze bank accounts, take possession of property, and enact "final decisions" returning the confiscated property to the "National Wealth." Chase was thereafter directed to freeze accounts belonging to certain former government officials and their families, and in September, 1959 the ministry ordered Chase to close such frozen accounts—including specifically those represented by Manas' certificates which had by then reached maturity—and remit the proceeds to the ministry. In compliance with that directive Chase turned funds in the amount of Manas' certificates over to the government. Approximately a year after the confiscation of Manas' assets, on July 6, 1960, the Castro government enacted Law No. 851, providing for nationalization of United States firms in Cuba, and by Resolution No. 2 of September 17, 1960, the government nationalized all of Chase's Cuban branches.

It was not until January, 1974 that Manas, by then residing in the United States, for the first time presented her certificates to Chase's office in New York and demanded payment, which was refused. Manas instituted this action in July, 1974 by motion for summary judgment in lieu of complaint, and Chase cross-moved for summary judgment. Both motions were denied, and the Appellate Division affirmed (52 A.D.2d 794, 383 N.Y.S.2d

357). Chase subsequently removed the case to the United States District Court for the Southern District of New York, but the action was remanded (443 F.Supp. 418).

The action proceeded to trial in June of 1980. The following three questions were submitted to the jury:

> "1. What was the intention of [Manas] and [Chase] with regard to the currency with which the certificates of deposit were to be repaid? 1. U.S. dollars; 2. Cuban pesos.
>
> "2. What was the intention of [Manas] and [Chase] with regard to the place of presentment of the certificates of deposit? 1. New York only; 2. Marianao, Cuba only; 3. any branch of the defendant Chase anywhere in the world, including New York and Marianao, Cuba; 4. any branch of defendant Chase anywhere in the world, excluding Marianao, Cuba.
>
> "3. Were [Manas'] funds on deposit in defendant Chase in Marianao confiscated by the Cuban government's Ministry of Misappropriated Funds?"

The jury found that the certificates of deposit were repayable in United States dollars, that the certificates could be presented to any Chase branch in the world, including New York and Cuba, and that Manas' funds on deposit in Chase's Marianao branch were confiscated by the Ministry of Misappropriated Funds.

Opinion of the Court of Appeals of the State of New York

Both parties then moved for judgment. In view of the jury's findings, Trial Term held that Chase's debt to Manas had its situs in Cuba as the certificates were capable of being repaid in Cuba and Chase's Cuban branches were open and operating subject to the laws and jurisdiction of the Cuban government at the time of the September, 1959 confiscation. Trial Term thereupon entered judgment for Chase in December, 1980, concluding:

> "In the case at bar, both the persons and the *res* were within the territorial dominion of the acting State at the time of the confiscatory taking. In this court's opinion, under the facts as established at trial, the situs of the debt herein was Cuba. In order for this debt to be beyond Cuban jurisdiction in this case, it would have been necessary for the jury to have found that the place of presentment was only outside of Cuba. The jury finding that payment could be anywhere did not change the situs of this debt from Chase in Cuba while it functioned there. It only created an option for plaintiff to collect the debt elsewhere prior to the confiscation. Although it is true, as asserted by plaintiff, that the parent bank is ultimately liable for the obligations of the branch (*Sokoloff v. National City Bank of N.Y.*, 130 Misc. 66, 224 N.Y.S. 102, affd. 223 App.Div. 754, 227 N.Y.S. 907, affd. 250 N.Y. 69, 164 N.E. 745), such a liability does not alter the situs of the debt. When the branch's liability is extinguished, as under the facts herein, the parent is relieved as well.
>
> "Accordingly, this court holds that the judicial self-limiting act of State doctrine applies

> herein as the confiscation of plaintiff's funds was an official act of a sovereign government fully executed within its own jurisdiction and whose validity this court must refuse to inquire into, thereby implicitly giving the act extraterritorial effect." (106 Misc.2d 660, 666-667, 434 N.Y.S.2d 868.)

The Appellate Division reversed (93 A.D.2d 402, 463 N.Y.S.2d 764), holding that: (1) the Act of State doctrine applies to the taking of intangible property such as Chase's debt to Manas only "where the obligation is found to be situated *exclusively* within the foreign State"; (2) "the Act of State doctrine should not be, and apparently never has been, applied to relieve an American bank of obligations owed by its branches to depositors" (93 A.D.2d, p. 409, 463 N.Y.S.2d 764); and (3) under the rationale of *Vishipco Line v. Chase Manhattan Bank,* 660 F.2d 854 (2nd Cir.), cert. den. ____ U.S. ____, 103 S.Ct. 313, 74 L.Ed.2d 291, when Chase's Cuban branches ceased operation due to the bank nationalization in 1960, Chase was not relieved from its obligation to redeem the certificates at its other branches, even though the nationalization decree provided that the Cuban government (through Banco Nacional de Cuba) assumed the liabilities of Chase's Cuban branches. Chase appeals to this court from that determination, and plaintiff cross-appeals from that portion of the Appellate Division's order relating to the computation of interest on the certificates. Because the Appellate Division's analysis erroneously ignores the impact of the September, 1959 confiscation specifically seizing Manas' deposits before Chase's Cuban branches ceased operation, and otherwise misperceives the applicability of the Act of State doctrine, we now reverse.

The basic premise of the Act of State doctrine is that "the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." (*Underhill v. Hernandez,* 168 U.S. 250, 252, 18 S.Ct. 83, 84, 42 L.Ed. 456; *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 416, 84 S.Ct. 923, 934, 11 L.Ed.2d 804; see Restatement, Foreign Relations Law of United States 2d, §41.) Whether the property seized is tangible or intangible is not dispositive. (*Menendez v. Saks & Co.,* 485 F.2d 1355, 1364 (2nd Cir.), revd. on other grounds *sub nom. Alfred Dunhill of London v. Cuba,* 425 U.S. 682, 96 S.Ct. 1854, 48 L.Ed.2d 301.) The doctrine applies when the foreign sovereign's act amounts to a taking of property within its own borders. (*Republic of Iraq v. First Nat. City Bank,* 353 F.2d 47 (2nd Cir.), cert. den. 382 U.S. 1027, 86 S.Ct. 648, 15 L.Ed.2d 540.)

We must first determine whether the property taken by the Cuban government—here, Chase's debt to Manas—was within its borders. For purposes of the Act of State doctrine, a debt is located within a foreign State when that State has the power to enforce or collect it. (*Weston Banking Corp. v. Turkiye Garanti Bankasi, A.S.,* 57 N.Y.2d 315, 324, 456 N.Y. S.2d 684, 442 N.E.2d 1195; *Zeevi & Sons v. Grindlays Bank [Uganda],* 37 N.Y.2d 220, 228, 371 N.Y.S.2d 892, 333 N.E.2d 168, cert. den. 423 U.S. 866, 96 S.Ct. 126, 46 L.Ed.2d 95; *Menendez v. Saks & Co.,* 485 F.2d 1355, 1364, *supra; United Bank v. Cosmic Int.,* 392 F.Supp. 262, affd. 542 F.2d 868, 873 (2nd Cir.).) Since *Harris v. Balk,* 198 U.S. 215, 222-223,[1] 25 S.Ct. 625, 626, 49 L.Ed. 1023, the power to enforce or collect a debt has been dependent on the presence

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1. Although another aspect of *Harris v. Balk* has been overruled (see *Shaffer v. Heitner,* 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683), the debt-situs holding remains unimpaired.

of the debtor. If the debtor is present in the foreign State and the debt is payable there, the foreign sovereign then has power to enforce or collect it, and a confiscation of that debt amounts to a seizure of property within that sovereign's borders.

At the time the Cuban government confiscated Manas' deposits in September, 1959, the debtor (Chase) was present in Cuba. Its Cuban branches were open and operating under Cuban authority, and the debt owed by Chase to Manas—as the jury found—was payable at any Chase bank in the world including the Marianao branch where it was confiscated. While the certificates had by that time matured, and could have been redeemed elsewhere, Manas had taken no steps to redeem them in or out of Cuba. Where, as here, Chase paid over the full amount of its debt pursuant to the direction of the Cuban government, a direction which under the Act of State doctrine is beyond our review, Chase is relieved of liability on any subsequent demand by Manas for the funds. (*Trujillo-M v. Bank of Nova Scotia,* 51 Misc.2d 689, 692-693, 273 N.Y.S.2d 700, affd. 29 A.D.2d 847, 289 N.Y.S.2d 389, cert. den. 393 U.S. 982, 89 S.Ct. 454, 21 L.Ed.2d 443.)[2]

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2. The Appellate Division's conclusion that "the Act of State doctrine • • • apparently never has been, applied to relieve an American bank of obligations owed by its branches to depositors" (93 A.D.2d, p. 409, 463 N.Y.S.2d 764) ignores the thrust of the decision in *Trujillo.* While the bank in *Trujillo* was a Canadian bank, the question presented was the liability of its New York office to repay deposits confiscated from one of its foreign branches pursuant to an order directed at plaintiff's accounts. The court in *Trujillo* determined that under the Act of the state of doctrine the bank could not be liable to plaintiff on his subsequent demand for repayment

The fact that Chase's debt to Manas was not exclusively payable in Cuba, but could in addition have been paid in other countries, does not affect this result. Manas bargained for and received the right to collect the debt from Chase at any of its branches throughout the world. While the debt contemplated alternate places of payment and thus had multiple situs, because it constituted but a single obligation to pay, payment at one of the places chosen for performance extinguished the debt at all of its situses. Manas herself surely could not have redeemed the certificates of deposit in Cuba and subsequently received payment on those same certificates at a Chase branch in another country. Chase's debt to Manas was satisfied by payment to the Cuban government in response to its confiscation of Manas' accounts, and at that point the debt, wherever else it had been payable, was extinguished.

Only when a debt or other obligation is not payable at all in the confiscating State would the Act of State doctrine be inapplicable. In such situations, the foreign sovereign has no power to enforce or collect the debt. (*Zeevi & Sons v. Grindlays Bank [Uganda],* 37 N.Y.2d 220, 371 N.Y.S.2d 892, 333 N.E.2d 168, *supra; Republic of Iraq v. First Nat. City Bank,* 353 F.2d 47, cert. den. 382 U.S. 1027, 86 S.Ct. 648, 15 L.Ed.2d 540, *supra.*) Here, however, as the jury found, Chase's debt to Manas was payable in Cuba, giving Cuba the jurisdiction to collect and enforce it, which the Cuban government exercised. By reason of the Act of State doctrine the legitimacy of the confiscation is beyond our review.[3]

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3. Given this result, we do not reach the applicability of subdivision 1 of section 138 and section 204-a (subd. 3, par. [a]) of the Banking Law. We note that in *Garcia v. Chase Manhattan Bank* ([SDNY-June 7, 1983]), a case similar on its facts, the Federal District Court found the Act of State doctrine

(Cont'd)

The Hickenlooper amendment (U.S. Code, tit. 22, §2370, subd. [e], par. [2]), which operates to preclude the application of the Act of State doctrine in certain circumstances, has no effect in this case. The amendment provides as follows: "Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation and the other standards set out in this subsection: *Provided,* That this subparagraph shall not be applicable (1) in any case in which an act of a foreign state is not contrary to international law or with respect to a claim of title or other right to property acquired pursuant to an irrevocable letter of credit of not more than 180 days duration issued in good faith prior to the time of the confiscation or other taking, or (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court."

(Cont'd)

inapplicable "since the situs of Chase's obligation to plaintiff was outside of the jurisdiction of Cuba," citing as its authority the Appellate Division decision which we now reverse. *Garcia v. Chase Manhattan Bank,* — F.2d — (2nd Cir. 1984) on March 28, 1984 was affirmed by the Court of Appeals for the Second Circuit.

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The Hickenlooper amendment does not apply to confiscations by a foreign State of the property of its own nationals within its borders since such confiscations are "not contrary to international law" (*F. Palicio y Compania, S.A. v. Brush*, 256 F.Supp. 481, 486-487, affd. 375 F.2d 1011, cert. den. *sub nom. Brush v. Republic of Cuba*, 389 U.S. 830, 88 S.Ct. 95, 19 L.Ed.2d 88), or to expropriated property that remains in the confiscating country without coming within the territorial jurisdiction of the United States (*Banco Nacional de Cuba v. First Nat. City Bank*, 431 F.2d 394, 400-402 (2nd Cir.), rev'd. on other grounds 406 U.S. 759, 92 S.Ct. 1808, 32 L.Ed.2d 466). Here, Manas was a Cuban citizen at the time of the confiscation and was either present in Cuba or only temporarily absent at the time of confiscation, and the debt, once seized in Cuba, did not come within this country's jurisdiction. Accordingly, the Hickenlooper amendment does not preclude application of the Act of State doctrine in this action.

Nor are the decisions in *Sokoloff v. National City Bank*, 239 N.Y. 158, 145 N.E. 917 and *Vishipco Line v. Chase Manhattan Bank*, 660 F.2d 854, cert. den. ____ U.S. ____, 103 S.Ct. 313, 74 L.Ed.2d 291, *supra*, in any way inconsistent with the result we reach today.[4] In both *Sokoloff* and *Vishipco*, the banks were not entitled to rely upon a foreign sovereign's order confiscating a depositor's property where the bank's branches in the foreign State had ceased operations prior to the confiscation order. The situs of the banks' debts to their depositors was thus no longer in the foreign States and the confiscation order directed at the depositor's property was of no effect. In *Sokoloff* this court

4. The Trial Term decision denying recovery to plaintiff is in fact cited in *Vishipco*, 660 F.2d 854, 863, and the court points out the factual distinction between the two cases.

explained that a "decree of confiscation directed against depositors does not reduce the liabilities of a bank which has already yielded up its assets in virtue of a decree of confiscation directed against itself." (239 N.Y. 158, 169, 145 N.E. 917.) And in *Vishipco* the Second Circuit wrote (p. 862): "More importantly, however, upon Chase's departure from Vietnam the deposits no longer had their situs in Vietnam at the time of the confiscation decree. As we have said in the past, '[f]or purposes of the act of the state doctrine, a debt is not "located" within a foreign state unless that state has the power to enforce or collect it.' *Menendez v. Saks and Co.*, 485 F.2d 1355, 1364 (2d Cir.1973), *rev'd on other grounds sub nom. Alfred Dunhill of London, Inc. v. Republic of Cuba,* 425 U.S. 682, 96 S.Ct. 1854, 48 L.Ed.2d 301 (1976). The rule announced in *Harris v. Balk,* 198 U.S. 215, 25 S.Ct. 625, 49 L.Ed. 1023 (1905), continues to be valid on this point: the power to enforce payment of a debt depends on jurisdiction over the debtor. Since Chase had abandoned its Saigon branch at the time of the Vietnamese decree, and since it had no separate corporate identity in Vietnam which would remain in existence after its departure, the Vietnamese decree would not have had any effect on its debt to the corporate plaintiffs." But in the case before us it is undisputed that at the time Manas' accounts were confiscated in September, 1959, Chase's branches in Cuba were open and operating, and the certificates had matured. Manas thus had the opportunity prior to the seizure to redeem the certificates in Cuba or at any of Chase's branches throughout the world. Since Chase's debt to Manas was extinguished before the bank was nationalized, there is no occasion to apply the rationale of *Sokoloff* and *Vishipco.*

In sum, the situs of Manas' property—the debt due from Chase on her certificates—was Cuba at the time of the

government's confiscation of her property and Chase's payment. The confiscation was an act of a foreign sovereign affecting the property of one of its own nationals within its own borders, and cannot be examined in this court. Having paid the full amount of the certificates, Chase was relieved of liability to make a second payment on those certificates when Manas presented them some 15 years later.[5]

Accordingly, the order of the Appellate Division should be reversed, and Trial Term's judgment for defendant Chase reinstated, and plaintiff's cross appeal dismissed as academic.

WACHTLER, Judge (dissenting).

Money deposited in an American bank which is payable at any of its branches, should not be deemed to have its situs in every country in which the bank may have a branch office, so that the debt may be extinguished by any government which decides to confiscate the account "located" within its borders. The concept that a debt may have multiple situses—in every jurisdiction where the debtor has established an office—has never been held by the Supreme Court to be an essential or acceptable ingredient of the Act of State doctrine.

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5. The dissent misapprehends our holding. We hold that in the circumstances disclosed in this record as crystallized by the verdict of the jury, the rights of plaintiff evidenced by the certificates of deposit issued by Chase were located in Cuba at the time of the confiscation specifically directed against Manas' assets, and that this act of the Cuban government is beyond our review. We do not hold that any purported confiscation by a foreign sovereign of deposits at American bank branches would be accorded similar effect. The certificates here were both issued and payable in Cuba, and therefore subject to enforcement and collection by the foreign sovereign. The circumstance that the Chase branch in Cuba was nationalized a year after confiscation of the certificates is irrelevant.

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A more conservative application of the Act of State doctrine should not bar the courts of this State from granting the plaintiff any relief in this case. Although the suit is occasioned by the confiscation of bank assets in Cuba, it involves only private litigants and the question as to which of them must bear the loss: the bank whose assets were physically confiscated; or the depositor whose intangible account, payable at any of the bank's worldwide branches, was designated in the Cuban order of confiscation. If the Act of State doctrine requires this court to abstain from considering the legality or illegality of the foreign seizure, and thus from deciding the case on that ground, it should not preclude the court from resolving this private dispute by consideration of other factors in much the same manner as we would if it had been precipitated by an act of nature.

The Act of State doctrine, which precludes the courts of this country from adjudicating the legality of acts of foreign governments, is akin to the rule which requires the courts to abstain from deciding political questions. It is a rule of Federal law which, although not expressly stated in the Constitution, has "constitutional underpinnings" and is binding on all courts, both State and Federal (*Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 417, 421, 427, 84 S.Ct. 923, 934, 936, 939, 11 L.Ed.2d 804). It is based on the principle that matters relating to foreign affairs are primarily within the province of the political branches of the Federal Government, and that it is inappropriate for the courts to pass on such matters in the context of individual suits because it could lead to confusion or embarrassment in an area in which the Nation should speak with one voice (*Banco Nacional de Cuba v. Sabbatino, supra,* pp. 423, 427-428, 84 S.Ct. pp. 937, 939-940). Thus, when the courts invoke the Act of State doctrine they are not enforcing the right of a private litigant. Instead they

are exercising judicial restraint by declining to decide a question which should properly be resolved through the political process by the political branches of the government charged with responsibility for the conduct of foreign affairs.

The application of the doctrine to foreign seizures of physical assets, such as ships, real estate, raw materials and other products, has posed little difficulty for the courts. In such cases the location of the property at the time of the confiscation is a matter of fact which is generally conceded (see, e.g., *Oetjen v. Central Leather Co.*, 246 U.S. 297, 38 S.Ct. 309, 62 L.Ed. 726; *Ricaud v. American Metal Co.*, 246 U.S. 304, 38 S.Ct. 312, 62 L.Ed. 733; *Shapleigh v. Mier*, 299 U.S. 468, 57 S.Ct. 261, 81 L.Ed. 355; *Banco Nacional de Cuba v. Sabbatino, supra*). Any threshold questions as to whether the property seized was within the territorial jurisdiction of the confiscatory power, have also been reduced to matters of fact. As Justice Holmes observed, in a case where it was urged that a plantation seized by troops from Costa Rica was actually in Panama: "The fact, if it be one, that *de jure* the estate is in Panama does not matter in the least; sovereignty is pure fact" (*American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 358, 29 S.Ct. 511, 513, 53 L.Ed. 826).

When, however, a foreign government has purported to seize an intangible asset "within" its territory, it is not clear from the Supreme Court decisions whether the Act of State doctrine is applicable and, if so, how it is to be applied (cf. *Alfred Dunhill of London v. Cuba*, 425 U.S. 682, 690, 96 S.Ct. 1854, 1859, 48 L.Ed.2d 301). The problem, of course, is that an intangible, such as a debt, has no actual physical location and can only be said to be "located" within a jurisdiction as a matter of law or "legal fiction" (*Severnoe Securities Corp. v. London & Lancashire Ins.*

Co., 255 N.Y. 120, 123, 174 N.E. 299 [Cardozo, J.]). If the doctrine does generally apply to intangibles it poses two problems for the courts. First, in order to determine whether the doctrine precludes the courts from considering the legality of the seizure in a given case, the court must decide, as a matter of law, the threshold question as to whether the intangible had its legal situs in the confiscating country. Thus the court must apparently violate the concept and determine the legality of the seizure, at least to the extent of determining the threshold question as to whether the confiscating country could lawfully exercise jurisdiction over the asset. This may be a tolerable intrusion into foreign affairs, although it is conceivable that a judicial resolution of the "limited" jurisdictional question could interfere with the political branches by undermining a position they have previously, and perhaps secretly, taken or might otherwise adopt in the future with respect to this or similar confiscatory acts.

Secondly, the courts must decide which law or legal fiction is most appropriate for fixing the situs of the intangible, bearing in mind that nothing is more intangible than the laws respecting the situs of an intangible (*Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co.*, 392 F.2d 706, 714 (5th Cir.)).

One of the many rules the courts may choose from, in determining the legal situs of an intangible asset, is the rule that the asset travels with the creditor (*Severnoe Securities Corp. v. London & Lancashire Ins. Co., supra*, 255 N.Y. p. 123, 174 N.E. 299; *Farmers Loan Co. v. Minnesota*, 280 U.S. 204, 50 S.Ct. 98, 74 L.Ed. 371). That rule is supported by fiscal reality since a debt can only be said to be an asset of the creditor, and not the debtor for whom it is a liability (*Railroad Co. v. Pennsylvania*, 15 Wall [82 US] 300, 320, 21 L.Ed. 179; *Farmers Loan Co. v.*

Minnesota, supra, 280 U.S. pp. 211-213, 50 S.Ct. pp. 100-101). Application of that rule to this case would permit the plaintiff to recover since the record does not establish that the creditor-depositor, and thus her intangible asset, was in Cuba at the time of the confiscation. The affirmed factual findings show only that the depositor fled Cuba before the confiscation, and made one or more return trips in early 1959 at unspecified times. There are also affirmed findings that the debt was payable in this State, and thus could be enforced against the bank which also has its headquarters in this State.

The complicating factor is that the facts establish that the debt was payable at any of the bank's branches anywhere in the world. That, of course, would include the branch it continued to maintain in Cuba at the time of the confiscation and for sometime afterwards, until the Cuban government nationalized its remaining assets. Because of these circumstances the bank and the *amicus,* New York State Bankers Association, urge that the court adopt the rule that the plaintiff's intangible asset should be held to have its legal situs where the debtor was located, although they disagree as to whether the rule should extend to all of the branches, as Chase contends, or only to the Cuban branch, as the *amicus* urges.

The court has applied the rule tendered by the defendant by relying on cases in which the debtor was not present in the confiscating country, or the debt was held not to be payable there (*Republic of Iraq v. First Nat. City Bank,* 353 F.2d 47, cert. den. 382 U.S. 1027, 86 S.Ct. 648, 15 L.Ed.2d 540; *Menendez v. Saks & Co.,* 485 F.2d 1355, 1364; *United Bank v. Cosmic Int.,* 392 F.Supp. 262, affd. 542 F.2d 868, 873 (2nd Cir.); *Weston Banking Corp. v. Turkiye Garanti Bankasi,* A.S., 57 N.Y.2d 315, 456 N.Y.S.2d 684, 442 N.E.2d 1195; *Zeevi & Sons*

v. Grindlays Bank [Uganda], 37 N.Y.2d 220, 371 N.Y.S.2d 892, 333 N.E.2d 168). Adoption of the rule in those cases placed the intangible beyond the confiscating power and, therefore, leaves open the question as to whether the courts would have found the same rule appropriate if it would have yielded a different result. The question was candidly reserved in the leading case *(Republic of Iraq v. First Nat. City Bank,* 353 F.2d 47, cert. den. 382 U.S. 1027, 86 S.Ct. 648, 15 L.Ed.2d 540, *supra)* where the court stated (at p. 51): "[I]n the absence of any showing that Irving Trust had an office in Iraq or would be in any way answerable to its courts, we need not consider whether [our] conclusion would differ if it did". That the selection of the "proper" rule is essentially a policy decision is underscored by the opinion in *Menendez v. Saks & Co.,* 458 F.2d 1355, revd. on other grounds *sub nom. Alfred Dunhill of London v. Cuba,* 425 U.S. 682, 96 S.Ct. 1854, 48 L.Ed.2d 301, *supra.* In that case the Cuban government urged that the court employ the competing rule, that the debt follows the creditor, and observed that it had been endorsed by the Supreme Court and indeed held constitutionally mandated in another context. The court rejected the argument simply noting that the Supreme Court's determination with respect to situs was based on different "policy" considerations (see, also *Tabacalera Severiano Jorge,* S.A. v. *Standard Cigar Co., supra).*

In sum, the cases employing the rule that an intangible is located where the debtor can be found do not establish a fixed rule of law under the Act of State doctrine and can only be so construed if the policy nature of the decisions is ignored (e.g., *Trujillo-M v. Bank of Nova Scotia,* 51 Misc.2d 689, 273 N.Y.S.2d 700 aff'd without opn. 29 A.D.2d 847, 289 N.Y.S.2d 389, cert. den., 393 U.S. 982, 89 S.Ct. 454, 21 L.Ed.2d 443). What is more significant is that the court's decision to employ the rule in the

prior cases served to "place" the asset within a single country. This is apparently the first case in which the rule has been applied to the Act of State doctrine in such a way as to expose deposits made in an American bank, payable in United States currency at any of its branches worldwide, to confiscation by any country in which the bank maintains a branch office.

This extension of the rule comes at a time when the rule itself has been discarded or abandoned in most, if not all, other areas of American jurisprudence. In recent years the Supreme Court has consistently found constitutionally unacceptable the notion that an intangible asset may be located, and therefore be subject to seizure by a third party, wherever the debt may be enforced against the debtor (see, e.g., *Farmers Loan Co. v. Minnesota, supra*; *Texas v. New Jersey*, 379 U.S. 674, 85 S.Ct. 626, 13 L.Ed.2d 596; *Shaffer v. Heitner*, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683; *Rush v. Savchuk*, 444 U.S. 320, 100 S.Ct. 571, 62 L.Ed.2d 516). In those cases the court has noted in particular that the natural tendency of the rule is to establish multiple situses for the debt, which could leave the creditor in an unfair position. One of the cases recently overruled is our own decision in *Seider v. Roth*, 17 N.Y.2d 111, 269 N.Y.S.2d 99, 216 N.E.2d 312.

Similarly the Supreme Court's most recent decisions with respect to the Act of State doctrine, all of which have been pluralities, also limit its application and call into a question many of the premises on which it rests (see *First Nat. City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 92 S.Ct. 1808, 32 L.Ed.2d 466, *supra; Alfred Dunhill of London v. Cuba*, 425 U.S. 682, 96 S.Ct. 1854, 48 L.Ed.2d 301, *supra*). The Supreme Court has never considered whether for the purposes of the Act of State doctrine an intangible bank asset may be said to be present wherever the

debt is enforceable against the bank. It is interesting to note, however, that the cases holding the rule applicable in that context have relied on older Supreme Court decisions (e.g. *Harris v. Balk*, 198 U.S. 215, 25 S.Ct. 625, 49 L.Ed. 1023), which as noted above, have recently been overruled by that court. The majority has admittedly relied on the overruled cases in the case now before us. Therefore, acceptance of the bank's position in this case resurrects dead concepts, extends the Act of State doctrine far beyond the Supreme Court's holdings and creates a kind of international *Seider v. Roth*.

In a narrow sense the Supreme Court's recent decisions rejecting the rule that a debt has its situs where it can be enforced against the debtor are distinguishable because the deal with the jurisdiction of the States, as opposed to that of foreign countries. Our courts, of course cannot place jurisdictional limitations on foreign governments, as they can with respect to the States. But the broader principle the cases stand for is that the courts can and should reject the legal fiction of a ubiquitous debt or one which roves with the debtor, when the rule is capable of producing unfair results between private litigants. That is a principle which can be enforced even when the private suit has been prompted by the confiscatory act of a foreign State.

Judicial deference to the Act of State doctrine can be accomplished in this case by ignoring legal fictions concerning intangibles and focusing instead on the fact that the only assets physically seized were those belonging to the bank. There is no doubt that the Act of State doctrine precludes the courts from considering the legality of Cuba's act in seizing the bank's assets. The court must accept, as a fact, that the title to the assets passed to the Cuban authorities and that they cannot be recovered from

that government or from those to whom it transfer the assets (see, e.g., *Oetjen v. Central Leather Co., supra; Banco Nacional de Cuba v. Sabbatino, supra).* With that issue out of the case the fact remains that the bank has sustained a loss which it now seeks to shift to the depositor by refusing to pay the account. In my view it should not be permitted to do so.

The essence of the relationship between the parties is that the bank agreed to safeguard the depositor's money. It did so in the midst of a revolution by accepting deposits from a person whose husband was an official in the government under attack. The bank specifically agreed that the certificates would be redeemed at any of its branches, most of which are in this country, and further agreed to pay in United States currency. Even after the revolution had succeeded, the bank remained in Cuba and maintained assets all of which could have been, and in fact ultimately were, confiscated by the Cuban government. Under these circumstances it could be said that the bank was fully aware of and accepted the risk of confiscation of its assets, and should not be permitted to refuse to honor its commitmemt to this depositor after her arrival in this country.

Accordingly, I would affirm the order of the Appellate Division.

JASEN, JONES, MEYER and SIMONS, JJ., concur with KAYE, J.

WACHTLER, J., dissents and votes to affirm in a separate opinion in which COOKE, C.J., concurs.

On defendant's appeal, order reversed, without costs, and judgment of Supreme Court, New York County, reinstated. Plaintiff's appeal dismissed, without costs.

ORDER AND JUDGMENT OF THE COURT OF APPEALS OF THE STATE OF NEW YORK

Remittitur

COURT OF APPEALS
STATE OF NEW YORK

The Hon. Lawrence H. Cooke, Chief Judge, Presiding

1 No. 117
Esther Garcia Manas Perez, as
Administratrix &c.,

Respondent-Appellant,

v.

The Chase Manhattan Bank, N.A.

Appellant-Respondent.

The appellant-respondent in the above entitled appeal appeared by Milbank, Tweed, Hadley & McCloy, Esqs.; the respondent-appellant appeared by Lipkowitz & Plaut, Esqs.

The Court, after due deliberation, orders and adjudges that on defendant's appeal, order reversed, without costs, and judgment of Supreme Court, New York County, reinstated. Plaintiff's appeal dismissed, without costs. Opinion by Judge Kaye in which Judges Jasen, Jones, Meyer and Simons concur. Judge Wachtler dissents and votes to affirm in an opinion in which Chief Judge Cooke concurs.

The Court further orders that this record of the proceedings in this Court be remitted to the Supreme Court, New York County, there to be proceeded upon according to law.

Order and Judgment of the Court of Appeals of the State of New York

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals.

s/ Donald M. Sheraw
Clerk of the Court

Court of Appeals, Clerk's Office, Albany, March 30, 1984.

OPINION OF NEW YORK STATE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

93 A.D.2d 402

Esther Garcia Manas PEREZ, as Administratrix of the Estate of Rosa Maria Manas Y Pineiro, Deceased,

Plaintiff-Appellant,

v.

The CHASE MANHATTAN BANK, N.A.,

Defendant-Respondent.

Supreme Court, Appellate Division,
First Department.

May 5, 1983.

Before SANDLER, J.P., and CARRO, FEIN, MILONAS and KASSAL, JJ.

MILONAS, Justice.

In 1958 during the final months of the Batista regime, plaintiff-appellant, a Cuban citizen, at various times obtained five certificates of deposit, totalling $227,336.47, from defendant-respondent Chase Manhattan Bank's Marianao branch in

Havana.* The forces of Fidel Castro assumed control of the Cuban government on January 1, 1959, and plaintiff's husband, who had been Batista's Minister of Communications, fled to Colombia in March of 1959. Plaintiff later joined her husband in Colombia, but she then returned to Cuba, where she remained for a number of months. She was reunited with her husband in Mexico, and in 1961, the couple moved to the United States. In September of 1959, the new Cuban government instructed Chase to close a number of frozen accounts, among them plaintiff's, and remit the proceeds to the Ministry for the Recovery of Misappropriated Funds. Shortly thereafter, all of Chase's branches were nationalized. Its assets were confiscated, and the liabilities were assumed by the government. Chase's former branches were henceforth operated by the Banco Nacional de Cuba.

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* The certificates of deposit are identical in form and differ only in the amounts and issue dates involved. The following represents one of those certificates in both its original Spanish and English translation:

No. FD 1877 Marianao La Habana, Cuba, Noviembre 7 de 1958 $66,440.16

THE CHASE MANHATTAN BANK
Marianao, Habana, Cuba

Hace Constar Que la Sra. Rosa Maria Manas y Pineiro

En Esta Fecha Ha Constituido En Este Banco En Calidad De Deposito A Plazo Fijo La Cantidad De: SESENTA Y SEIS MIL CUATROCIENTOS CUARENTA Y 16/100 Moneda Nacional La Que Le Sera Devuelta Previa Presentacion De Este Documento En Abril 7 De 1959, Mas Intereses Al TRES Por Ciento Anual (-3%), Quedando Entendido Que El Referido Deposito No Es Transferible Ni Negociable En Forma Alguna Y Unicamente Podra Ser Devuelta Al Depositante.

(Cont'd)

Opinion of New York State Supreme Court, Appellate Division, First Department

In January of 1974, plaintiff demanded in New York that Chase make payment under the certificates of deposit. The next month, Chase notified plaintiff that it would not honor her request for payment, stating that the certificates were obligations incurred

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(Cont'd)

Signature Illegible
Firm Authorizada
cgz

The Chase Manhattan Bank
Signature Illegible
Firma Authorizada

TRANSLATION

from: Spanish WB:rf

No. FD 1877 Marianao, Havana, Cuba, November 7, 1958

Pesos 66,440.16

The Chase Manahattan Bank
New York
Marianao Branch

Herewith certifies that Rosa Maria Manas y Pineiro has today established at this Bank as fixed-term deposit the amount of: Sixty-Six Thousand Four Hundred Forty And 16/100—national currency, which will be returned upon submission of this document on April 7, 1959, plus interest at Three Per Cent Per Annum (-3%), it being understood that said deposit is not transferable or negotiable in any form and can only be returned to the depositor.

The Chase Manhattan Bank

s/Signature Illegible
Authorized Signature
cgz

s/Signature Illegible
Assistant Manager

solely by Chase's Marianao branch, and since the Cuban government had seized that bank's assets and acquired its liabilities, Chase in New York had no responsibility in the matter. Plaintiff then commenced the instant action by motion for summary judgment in lieu of complaint, and Chase cross-moved for summary judgment. The Supreme Court, New York County, denied both motions, and this court affirmed, asserting that there were sufficient factual issues involved to preclude summary judgment (*Manas y Pineiro v. Chase Manhattan Bank,* 52 A.D.2d 794, 383 N.Y.S.2d 357). Although Chase subsequently removed the case to the United States District Court for the Southern District of New York, the court remanded back to the state court (443 F.Supp. 418).

The parties finally proceeded to trial in June of 1980. The following three questions were submitted to the jury:

> 1. What was the intention of the plaintiff and the defendant with regard to the currency with which the certificates of deposit were to be repaid? 1. U.S. dollars; 2. Cuban pesos.
>
> 2. What was the intention of the plaintiff and the defendant with regard to the place of presentment of the certificates of deposit? 1. New York only; 2. Marianao, Cuba only; 3. any branch of the defendant Chase anywhere in the world, including New York and Marianao, Cuba; 4. any branch of defendant Chase anywhere in the world, excluding Marianao, Cuba.
>
> 3. Were the plaintiff's funds on deposit in defendant Chase in Marianao confiscated by the

Opinion of New York State Supreme Court, Appellate Division, First Department

Cuban government's Ministry of Misappropriated Funds?

The jury returned a verdict on the first two questions that the certificates of deposit were repayable in United States dollars and that the certificates could be presented to any Chase branch in the world, including New York and Cuba. After asking for clarification as to the third question, and then indicating some uncertainty with the court's explanation, the jury ultimately answered "Yes" to whether the plaintiff's funds on deposit in Chase's Marianao branch were confiscated by the Ministry of Misappropriated Funds. Based upon these findings and, as a matter of law, the trial court granted judgment to the defendant. (*Sub nom. Manas y Pineiro v. Chase Manhattan Bank,* 106 Misc.2d 660, 434 N.Y.S.2d 868.)

In *Underhill v. Hernandez,* 168 U.S. 250, 18 S.Ct. 83, 42 L.Ed. 456, the United States Supreme Court defined the act of state doctrine as providing that: "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." (at 252, 18 S.Ct. at 84). This principle was reaffirmed in *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed.2d 804, wherein the Supreme Court declared that "the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law." (at 428, 84 S.Ct. at 940). Thus, according to the Supreme Court, United

States courts should not ordinarily engage themselves to resolve disputes arising out of the nationalization by other nations of property owned by aliens.

Apparently dissatisfied with the decision in *Sabbatino,* as well as with the failure of the Executive Branch adequately to protect American property abroad from expropriation, Congress adopted the so-called "Hickenlooper Amendment". The first version became part of the Foreign Assistance Act of 1964 and provided that:

> Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation and other standards set out in this subsection. . . . (78 U.S.Stat. 1013, 22 U.S.C. §2370[e][2].)

Nonetheless, the practical impact of the "Hickenlooper Amendment" (both the first and subsequent variations thereof) is uncertain. For instance, in *French v. Banco Nacional de Cuba,* 23 N.Y.2d 46, 295 N.Y.S.2d 433, 242 N.Ed.2d 704, the New York Court of Appeals considered the effect of the amendment on the action before it. There, plaintiff's assignor, Alexander Ritter, an American citizen who resided in Cuba at the time of the events

in question, put about $350,000 into a Cuban farm. This was in 1957, when the Cuban government permitted foreign investors to convert the proceeds from their enterprises into American dollars or other currency, and exempted such proceeds from Cuba's tax on the exportation of money. For this purpose, the Currency Stabilization Fund of the Cuban government would issue "certificates of tax exemption". In June of 1959, six months after Castro came to power, Ritter acquired eight such certificates, aggregating $150,000. On July 15, 1959, the Currency Stabilization Fund suspended the processing of tax exemption certificates and declined to redeem Ritter's certificates in American dollars when he tendered them in December of 1959. Thereafter, plaintiff instituted suit against the defendant bank. The Court of Appeals ruled, however, that the action was barred under the act of state doctrine, since the alleged breach of contract resulted from an act of state. In the view of the court, the refusal of the Cuban government to exchange certificates (pesos) for dollars was not the sort of taking envisioned by the "Hickenlooper Amendment", but rather involved a currency control regulation not subject to challenge in our courts.

The United States Supreme Court also had occasion to consider the scope of the act of state doctrine following the passage of the amendment. In two separate cases, a divided court seemed to retreat from the broad position which it had taken in *Banco Nacional de Cuba v. Sabbatino, supra (First National City Bank v. Banco Nacional de Cuba,* 406 U.S. 759, 92 S.Ct. 1808, 32 L.Ed.2d 466 and *Alfred Dunhill of London, Inc. v. Republic of Cuba,* 425 U.S. 682, 96 S.Ct. 1854, 48 L.Ed.2d 301). In *First National City Bank v. Banco Nacional de Cuba, supra,* the court was confronted with the question of whether First National City Bank could retain the balance of proceeds derived from the sale

of collateral securing a loan to a predecessor of Banco Nacional, after deducting the loan balance due, as a set-off against bank property which had been appropriated by Cuba. After hearing the case on the merits, the Supreme Court, by a five to four vote, reversed a Second Circuit decision that the court was precluded by the act of state doctrine from reviewing the validity of the Cuban seizure, and remanded for consideration under principles of customary international law. Three Justices concluded that since the Executive Branch, which is charged with the primary responsibility for the conduct of foreign affairs, had represented that reliance upon the act of state doctrine would not advance the interests of American foreign policy ("Bernstein letter") the judiciary should examine the legal issues raised by the acts of a foreign sovereign within its own territory. Of the two concurring Justices, one went so far as to challenge the court's prior holding in *Sabbatino*. The four dissenters expressed the opinion that the act of state doctrine, as enunciated in *Sabbatino,* required that First National City Bank's counterclaims against Banco Nacional be dismissed on the ground that "the validity of a foreign act of state in certain circumstances is a 'political' question not cognizable in our courts." (406 U.S. at 787-788, 92 S.Ct. at 1822-1823) However, except for reference in one of the dissent's footnotes to the "Hickenlooper Amendment" (at 780, n.5,92 S.Ct. at 1819, n. 5, stating that "I agree with my colleagues in leaving . . . undisturbed" the Second Circuit's determination that the "Hickenlooper Amendment" was inapplicable), there is no discussion at all of that amendment.

Alfred Dunhill of London, Inc. v. Republic of Cuba, supra, concerned the nationalization by the Cuban government of the business and assets of five leading manufacturers of cigars, whose plants were located in Cuba and whose products were shipped

to importers in the United States. Upon the take-over by the Cuban Government, the owners were immediately ousted and persons called "interventors" were designated as its agents to manage the businesses. Both the former owners and the interventors asserted their right to sums due from importers for shipments made after the Cuban seizure. In addition, as of the date of the confiscation, the importers also owed various amounts for preintervention shipments, which they later paid to the interventors. The former owners also laid claim to these accounts. The District Court, in reliance upon the act of state doctrine, ruled that the interventors could collect the amount due for cigars shipped after the nationalization but that the owners were entitled to the preintervention accounts receivable.In addition, the interventors were obligated to repay the importers for the sums mistakenly paid them, and the importers could set-off their postintervention payments due to the interventors against the amounts owed to the owners for preintervention shipments. The Second Circuit, however, held that the Cuban government's appropriation of the owners' accounts receivable, having their situs in the United States, was unauthorized, but that the interventors' refusal to reimburse the importers for the amount paid by mistake for preintervention shipments was an act of state. The court did allow the importers' counterclaims for reimbursement, but only up to the limit of the interventors' claims for postintervention shipments. Further, the "Hickenlooper Amendment" was deemed no bar to invoking the act of state doctrine.

The Supreme Court, once again by a five to four vote, reversed, finding that the refusal of the interventors to return the sums paid to them in error did not constitute an act of state. Of the majority, four Justices stated that reversal was warranted because "the concept of an act of state should not be extended

to include the repudiation of a purely commercial obligation owed by a foreign sovereign or by one of its commercial instrumentalities." (*Alfred Dunhill of London, Inc. v. Republic of Cuba, supra,* 425 U.S. at 695, 96 S.Ct. at 1861). Quoting from *Ohio v. Helvering,* 292 U.S. 360, at 369, 54 S.Ct. 725 at 726, 78 L.Ed. 1307, and *New York v. United States,* 326 U.S. 572 at 579, 66 S.Ct. 310 at 313, 90 L.Ed. 326, these Justices stated (425 U.S. at p. 696, 96 S.Ct. at p. 1862) that: " ' When a state enters the market place seeking customers it divests itself of its *quasi* sovereignty *pro tanto,* and takes on the character of a trader. . . .' It is thus a familiar concept that 'there is a constitutional line between the State as government and the State as trader. . . .' " Although the dissenting opinion concluded that an act of state was involved here, it did not exclude the possibility of a "commercial act" exception to the act of state doctrine. It merely noted that "ultimately there is no need to consider whether, and under what circumstances, an exception for commercial acts might be appropriate. It will suffice to say that no such exception is appropriate in this case." (425 U.S. at 724, 96 S.Ct. at 1875)

Regardless of whether or not the Supreme Court ultimately establishes a "commercial act" exception to the act of state doctrine, it is clear that while the principle of act of state has been applied by courts with regard to the taking by a foreign sovereign of tangible property within its own territory, the viability of the doctrine as to intangible property in the nature of debts and claims is not settled. It does appear, however, that where the obligation is found to be situated *exclusively* within the foreign state, then the act of state doctrine will be applied. In *Dougherty v. Equitable Life Assurance Society of the United States,* 266 N.Y. 71, 193 N.E. 897, the Court of Appeals denied recovery under insurance contracts which were entered into prior to the Russian

revolution between the defendant, a New York Corporation, and subjects of the Imperial Russian government. The policies contained express provisions that all disputes thereunder would be settled according to Russian laws and in Russian courts and that the right to do business in Russia might at any time be cancelled by the government. After the revolution, the Soviet authorities promulgated decrees giving the government an exclusive monopoly over the insurance business and requiring that all private companies, including that of the defendant, be completely liquidated. All life insurance policies were cancelled, and defendant's assets in Russia were seized. The court held that under the contracts at issue, the defendant was not liable under Russian law determined that there was an obligation and, since the United States had recognized the Soviet Republic, its decrees constituted the valid law of Russia.

Certainly, the action of state doctrine should not be, and apparently never has been, applied to relieve an American bank of obligations owed by its branches to depositors. For one thing, obligations undertaken by a corporation at a branch are generally obligations of the corporation as a whole. (See *United States v. First National City Bank*, 2 Cir., 321 F.2d 14) For another, the bank is not considered to be merely a bailee for the depositor, nor are any of its assets particularly set aside for the depositor's use. *(Sokoloff v. National City Bank of New York*, 239 N.Y. 158, 145 N.E. 917) In *Sokoloff*, the plaintiff, a Russian subject, paid a sum of money to the defendant bank which was to be transferred to his account at the bank's Petrograd branch. This was done, and the plaintiff from time to time drew upon the funds in his account, but subsequent checks were presented and dishonored. The defendant alleged that there was a revolution in Russia in November of 1917, which resulted in the formation of

the Russian Socialist Federated Soviet Republic and that, in the same month, the new government decreed the nationalization of all private joint stock banks organized under the laws of Russia or operating therein. Also pursuant to that decree, all assets and liabilities of the liquidated banks were taken over by the State Bank of the Soviet government and, therefore, the defendant contended, the government assumed the liability, if any, owing to the plaintiff, thus divesting the defendant of any responsibility. In rejecting the bank's argument, the court stated that:

> The defendant's liability was unaffected by the attempt to terminate its existence and the seizure of its assets. A government of Russia *could* not terminate its existence either by dissolution or by merger, for it was a corporation formed under our laws, and its corporate life continued until the law of its creation declared that it should end. What a Russian government could do was to deprive it of the privilege of doing business upon Russian soil. But the ending of its Russian business was not the ending of its duty to make restitution for benefits received without requital. (at 167, 145 N.E. 917)

According to the Court of Appeals, the "*res* belonging to the plaintiff was not a physical object committed to the defendant's keeping, but an intangible right, a chose in action, the right to receive rubles in the future under an executory contract. This contract the defendant has not yet performed, yet it refuses to return the dollars that were paid to it by the plaintiff upon its promise of performance." (at 166, 145 N.E. 917)

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In a case bearing some similarity to the instant one, the Second Circuit considered the liability of defendant Chase Manhattan Bank to plaintiffs, Vietnamese corporations which had maintained piastre demand deposit accounts at Chase's Saigon branch and a Vietnamese citizen who had purchased a six-month certificate of deposit from that same branch. (*Vishipco Line v. Chase Manhattan Bank, N.A.*, 2 Cir., 660 F.2d 854, *cert. den.* ____ U.S. ____, 103 S.Ct. 313, 74 L.Ed.2d 291) Plaintiffs claimed that Chase breached its deposit contracts with them when it closed its Saigon branch in April of 1975 to escape from the Communist insurgents and then refused to make payment in New York of the amounts owed. Chase interposed a series of affirmative defenses, including the assertion that the confiscation of Chase's former branch in South Vietnam by the dominant authorities relieved Chase of any liability to plaintiffs and that Chase could not be held liable since the piastre accounts for which plaintiffs sought recovery were payable only in piastre at its Saigon branch. In reversing a District Court determination that the Vietnamese government was the successor in interest to the plaintiff corporations and that the real defendant was not Chase in New York but Chase's former branch in Saigon, the Second Circuit concluded that the "impossibility of performance in Vietnam did not relieve Chase of its obligation to perform elsewhere. By operating in Saigon through a branch rather than through a separate corporate entity, Chase accepted the risk that it would be liable elsewhere for obligations incurred by its branch." (at 863) The Court also noted that:

> A bank which accepts deposits at a foreign branch becomes a debtor, not a bailee, with respect to its depositors. In the event that unsettled local conditions require it to cease operations, it should

> inform its depositors of the date when its branch will close and give them the opportunity to withdraw their deposits or, if conditions prevent such steps, enable them to obtain payment at an alternative location . . . . In the rare event that such measures are either impossible or only partially successful, fairness dictates that the parent bank be liable for those deposits which it was unable to return abroad. (at 864)

Moreover, the court in *Vishipco* rejected Chase's attempt to rely on the provision of section 138 of the New York Banking Law, which, under certain circumstances, limits the liability of banks having foreign branches for contracts to be performed at those branches, declaring that section 138 applies only to New York State banks and not those, such as Chase, which are national in scope. However, even assuming section 138 could be interpreted to cover situations involving national banks, the statute in no way relieves a bank from liability for deposits payable at both the branch and home office.

In the matter at issue here, the jury found that the certificates of deposit could be presented to any Chase branch in the world, including its New York office. As Patrick Heininger has written in his detailed article, *Liability of U.S. Banks for Deposits Placed in Their Foreign Branches*, Law and Policy in International Business, Vol. 11, pp. 903-1034: "The fact that a Cuban decree provided that the Banco Nacional assumes a liability of Chase's Cuban branch would not, and could not in these circumstances, affect a liability the bank had undertaken in respect to its New York office. Even if the Cuban decree purported to affect such liability, the New York courts would neither be obligated to, nor

should they, give it effect. An act of state that permits a particular result, but does not require it, need not be given effect." (at 994)

Mr. Heininger also points out that it is easy enough for a government to order the seizure of a branch's assets, but quite another for it to actually gain control over those assets. (at 999-1000) Funds entrusted to banks by depositors do not ordinarily rest undisturbed in the branch's vaults. The money is loaned out and otherwise invested, so that the expropriation will generally be quite ineffective as to investments and loans made outside the branch nation. In addition, deposits collected in the confiscating country may be sent back to the home office for use there. Assets derived from this source also will not be lost as a consequence of the nationalization. Therefore, to uphold the trial court's decision in the present case could actually have the effect of providing a windfall for Chase and other banks in its position. Although these banks would, in the event of nationalization, no longer bear any liability in connection with obligations incurred at its foreign branches, they would, in all probability, be divested of only a portion of the assets obtained from depositors in the host nation. The fact that Chase may have chosen to comply with Cuba's direction to remit the proceeds of plaintiff's account to the Ministry for the Recovery of Misappropriated Funds does not relieve the bank of its obligation to plaintiff. Plaintiff cannot be bound by Chase's voluntary action in making payment to Cuba, since a government which has adopted a law seizing a bank's assets would have no means of enforcing its edict beyond its own borders. (*Republic of Iraq v. First National City Bank*, 2 Cir., 353 F.2d 47, *cert. den.* 382 U.S. 1027, 86 S.Ct. 648, 15 L.Ed.2d 540.) In that regard, the Court of Appeals, in a recent discussion of the act of state doctrine (*Weston Banking Corp. v. Turkiye Garanti Bankasi*, 57 N.Y.2d 315, at 323-324, 456 N.Y.S.2d 684, 442 N.E.2d 1195), has stated that:

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> We have, however, refused to apply the doctrine when the debt sought to be enforced was not located within the State whose acts are said to be dispositive. (*Zeevi & Sons v. Grindlays Bank [Uganda]*, 37 N.Y.2d 220, 228 [371 N.Y.S.2d 892, 333 N.E.2d 168], cert. den. 423 U.S. 866 [96 S.Ct. 126, 46 L.Ed.2d 95].) . . . "The doctrine is not applicable here", we held, "since a debt is not 'located' within a foreign State unless that State has the power to enforce or collect it." . . .

The jury herein found that Chase was obliged to redeem the certificate of deposit, defined as a written acknowledgment by a bank of the receipt of money with an engagement to repay it (9 N.Y.Jr.2d Banks, sec. 267), for dollars upon presentment at "any branch of defendant Chase anywhere in the world, including New York and Marianao, Cuba." In view of the existing caselaw authority, and considering the realities of commercial business practices, Chase's effort to escape its clear obligation to plaintiff cannot be sanctioned by this court. The act of state doctrine is simply not applicable to the situation with which this court is confronted.

Accordingly, judgment of the Supreme Court, New York County entered on December 29, 1980, which awarded judgment to defendant Chase Manhattan Bank, should be reversed on the law, with costs, and judgment directed in favor of plaintiff. Settle order.

Judgment, Supreme Court, New York County, entered on December 29, 1980, unanimously reversed on the law, and

Opinion of New York State Supreme Court, Appellate Division, First Department

judgment directed in favor of plaintiff. Appellant shall recover of respondent $75 costs and disbursements of this appeal.

All concur.

OPINION OF THE NEW YORK SUPREME COURT, TRIAL TERM, NEW YORK COUNTY

106 Misc.2d 660

Rosa Maria MANAS Y PINEIRO,

Plaintiff,

v.

The CHASE MANHATTAN BANK, N.A.

Defendant.

Supreme Court, Trial Term,
New York County, Part 70.

Dec. 3, 1980.

LEONARD N. COHEN, Judge:

This case is an illustrative caveat to foreign nationals purchasing promissory money instruments from American branch banks abroad wherein subsequent to purchase a foreign governmental change results in the confiscation of the national's funds. Unless the instrument clearly expresses intentions of payment of such a debt in U.S. dollars in the United States only the national's expectation of ultimate payment here may prove illusory.

Plaintiff is a Cuban citizen, currently residing in the United States in exile. Plaintiff's husband was the Minister of Communications in the former Batista government's cabinet.

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Plaintiff's husband is now also in the United States, in exile, having taken asylum in the Colombian Embassy in Cuba when Castro assumed control of the Cuban government on January 1, 1959 and in March 1959, leaving his homeland without ever returning.

On various dates between May and December, 1958, plaintiff purchased five non-negotiable certificates of deposit (hereinafter referred to as CD's) from the defendant, Chase Manhattan Bank, N.A. (hereinafter referred to as Chase) with varying maturity dates of one year or less totalling "$227,336.47" in "Moneda Nacional" at an annual interest rate of 3% at Chase's Marianao, Cuban branch. On their face, the CD's were ambiguous as to both the currency in which they were payable and the place of presentment, neither having been specifically or unambiguously provided.

In January, 1974, the CD's were presented for payment by the plaintiff at Chase's principal place of business in New York City. On February 14, 1974, Chase refused to honor the drafts. On July 24, 1974, the plaintiff commenced an action to recover the principal amount of the five CD's in US dollars by motion for summary judgment in lieu of complaint, with defendant Chase cross-moving for summary judgment. Both motions were denied at Special Term of this court by Justice Hilda Schwartz, who stated in an order dated August 1, 1975, that:

> "There are questions of fact to be resolved including,—but not limited to, whether the deposits were made in U.S. currency, whether they were payable in U.S. currency, whether representations were made to the plaintiff, as she claims, that her certificates would be payable in the U.S., in view of the lack of any restriction as to the place of

payment on the face of the certificates, whether the bank, under the circumstances extant in Cuba at the time of the deposit, was chargeable with knowledge of the purpose of the deposits, or whether assets of the bank were transmitted out of Cuba between the time of the deposit and the Cuban government's actions to cover this liability."

On Appeal by Chase, the Appellate Division in a three-to-two decision in May, 1976, affirmed this holding, stating that:

> "As observed by Special Term, there are issues of fact raised not alone by the omissions in the documents as to place of payment and the venue thereof but also as to plaintiff's status vis-a-vis the Cuban government when it committed the dictatorial acts, said to be in accordance with its laws of claimed appropriation of the debt owed to plaintiff, as well as the currency with which it might have been paid. The question of plaintiff's status alone is sufficient at this juncture to preclude decision as to whether the claimed seizures were permissible acts of a sovereign state upon which defendant appears to rely in rejection of plaintiff's claim".

In accordance with the Appellate Division majority decision, this case was set down for a jury trial of these factual issues raised by the ambiguities of the face of the CD's and by defendant Chase's defenses.

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The plaintiff's theory of recovery was based simply on the proper presentment of an instrument for the payment of money only. Plaintiff asserts her right to demand payment upon presentation of the CD's in dollars at any Chase branch in the world. Defendant Chase claimed the CD's were payable only in pesos and only at its Marianao, Cuba branch. Further, Chase asserts several statutory and common law defenses stemming from the events which took place in Cuba following Castro's assumption of power.

After trial, questions of fact were submitted to the jury for a special verdict to resolve the apparent ambiguities and determine the intention of the parties at the time of the transaction as to (1) whether the place of presentment of the CD's was in New York only, Marianao, Cuba only, or a Chase branch anywhere in the world, including New York and Marianao, Cuba; (2) whether the currency in which repayment was to be made was U.S. dollars only, or Cuban pesos only; and (3) whether plaintiff's funds on deposit in defendant Chase's Cuban branch had been confiscated by the Cuban government.

In its special verdict, the jury found that the CD's were repayable in U.S. dollars at a Chase branch anywhere in the world, including New York and Marianao, Cuba, and further that plaintiff's funds on deposit with the Chase branch in Marianao, Cuba, had been in fact confiscated by the Castro government.

After the rendition of the special verdict and upon the jury's findings, both plaintiff and defendant moved for judgment as a matter of law. Plaintiff asserted her right to present the CD's anywhere in the world and collect U.S. dollars as consistent with the jury's verdict.

Opinion of the New York Supreme Court, Trial Term, New York County

The defendant raised the following defenses as a matter of law. First, defendant urges that as a matter of common law, defendant is relieved of liability because the act of state doctrine prohibits this court from inquiring into the validity of the confiscation of plaintiff's funds or the nationalization of defendant's assets by the duly constituted Castro government. Secondly, with respect to the obligation of the main branch of Chase in New York, defendant argues that as a New York State chartered bank, New York Banking Law §138(1) (McKinney's 1971) applies and extinguishes any obligation on the part of the parent bank for the obligations of its branches in a foreign country where local foreign branches under the same circumstances would no longer be liable. Thirdly, Chase asserts that the jury finding that the CD's were payable only in U.S. dollars was against the weight of the evidence.

As to the third defense, this Court finds the verdict not to be against the weight of the credible evidence and therefore this defense is dismissed as without merit.

Turning to the first defense, Chase urges that under common law, the Cuban acts of confiscation of plaintiff's deposited funds in defendant's Cuban branch and the nationalization of Chase's Cuban branch assets and liabilities extinguished its liability to repay these CD's. This argument is based on the theory that such seizures or takings were the acts of a foreign government which under the act of state doctrine may not be scrutinized by the courts of the United States.

There is no dispute that all the Chase Cuban branches were nationalized in September, 1960, and that the Castro government expropriated the Chase assets and liabilities. More significantly,

the jury found that plaintiff's funds represented by the CD's and on deposit with Chase were confiscated in September, 1959, pursuant to the laws promulgated by the Cuban Ministry of Misappropriated Funds. This confiscation was a valid legally binding act of the Cuban government, even assuming a lack of publication in the Official Gazette as asserted by plaintiff as being required by Cuban law. *French v. Banco Nacional de Cuba*, 23 N.Y.2d 46, 295 N.Y.S.2d 433, 242 N.E.2d 704 (1968); *Banco de Espana v. Federal Reserve Bank*, 114 F.2d 438 (2d Cir. 1940).

The question for resolution by this Court is the applicability of the act of state doctrine to this confiscation and if such doctrine is applicable, its legal consequences for these parties.

The classic statement of the act of state doctrine is found in *Underhill v. Hernandez*, 168 U.S. 250, 252, 18 S.Ct. 83, 84, 42 L.Ed. 456 (1897), and it requires that every sovereign state is bound "to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory". See also, *Banco Nacional de Cuba v. Sabbatino, et al.*, 376 U.S. 398, 84 S.Ct 923, 11 L.Ed.2d 804 (1964); *French v. Banco Nacional de Cuba*, supra; *Pons v. Republic of Cuba*, 294 F.2d 925 (D.C.Cir.) cert. den. 368 U.S. 960, 82 S.Ct. 406, 7 L.Ed.2d 392 (1961); Restatement of the Foreign Relations Law of the U.S. 2d, Sec. 41 (1965). Our courts will not examine the validity of the taking of property by a foreign government within its own territory, even if it is asserted that the taking was in violation of international law. *Banco Nacional de Cuba v. Sabbatino*, supra. As stated in *Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co.*, 392 F.2d 706, 715 (5th Cir. 1968) cert. den. 393 U.S. 924, 89 S.Ct. 255, 21 L.Ed.2d 260 (1968): "It is

Opinion of the New York Supreme Court, Trial Term, New York County

* * when a foreign government performs an act of state which is an accomplished fact, that is when it has the parties and the *res* before it and acts in such a manner as to change the relationship between the parties touching the *res*, it would be an affront to such foreign government for courts of the U.S. to hold that such an act was a nullity". To determine whether the act herein was an accomplished fact, the Court must determine the situs of the debt evidenced by the plaintiff's CD's for only if that debt had its situs in Cuba could the Cuban government act in a way to extinguish plaintiff's right to repayment.

The resolution of the situs of the CD's is a difficult question. The situs of intangible property is as intangible a concept as is known to law. It has been noted that the situs of intangible property may vary according to the purpose for which the question is posed. *Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co.*, supra. However, it would appear that it is now accepted for the purpose of the act of state doctrine that a debt is located within a foreign state if that state has the power to enforce or collect it. *Menendez v. Saks & Co.*, 485 F.2d 1355 (2d Cir. 1973); rev'd other grounds sub nom. *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 96 S.Ct. 1854, 48 L.Ed.2d 301 (1975). Such a view is consistent with the act of state doctrine in that having the power to collect or enforce the debt, the foreign state would also have the concomitant power to "take it". A finding that the Cuban government had the power to collect or enforce this debt rests ultimately upon a determination that the parties or their agents were present in Cuba and subject to the jurisdiction of the Cuban courts at the time of the confiscation. To make this initial determination, we must turn to the facts adduced at trial.

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There is no doubt that Chase was subject to the jurisdiction of the Cuban courts at the time of the confiscation. The Chase branches in September, 1959, were open and operating subject to the laws and jurisdiction of the Cuban government. Plaintiff also was subject to the laws of Cuba at the time of the taking. She was a Cuban citizen, either actually in Cuba on the day of confiscation, or temporarily outside the country. In any event, it is clear that if she was outside Cuba, it was only a temporary visit to Colombia. She returned to Cuba shortly thereafter and had not established residency anywhere else. In this sense, her status, as raised by the Appellate Division, was of a Cuban citizen, subject to Cuban law at the time of the confiscation.

These circumstances were unlike the situation in *Republic of Iraq v. The First National City Bank*, 241 F.Supp. 567, affd. 353 F.2d 47 (2d Cir. 1966) cert. den. 382 U.S. 1027, 86 S.Ct. 648, 15 L.Ed.2d 540 (1966), where the Court held that plaintiff could not recover the allegedly confiscated funds of the former King Faisal which were on deposit in defendant's New York bank. The court therein specifically noted that the defendant had no branch offices in Iraq and therefore the debtor was not subject to the jurisdiction of the Iraqi courts. Consequently, Iraq had no power to compel payment or collection, the subject matter of the taking being outside the jurisdiction at the time of the taking. In *Trujillo-M v. Bank of Nova Scotia*, 51 Misc.2d 689, 273 N.Y.S.2d 700 (Sup. Ct., N.Y.Co. 1966), affd. 29 A.D.2d 847, 289 N.Y.S.2d 389 (1st Dept. 1967) cert. den. 393 U.S. 982, 89 S.Ct. 454, 21 L.Ed.2d 443 (1968), the Court acknowledged the taking as an accomplished act of a foreign government, having found that the branch bank was located in the jurisdiction and therefore both the debtor and creditor were subject to the jurisdiction of the foreign government.

Opinion of the New York Supreme Court, Trial Term, New York County

In the case at bar, both the persons and the *res* were within the territorial dominion of the acting state at the time of the confiscatory taking. In this court's opinion, under the facts as established at trial, the situs of the debt herein was Cuba. In order for this debt to be beyond Cuban jurisdiction in this case, it would have been necessary for the jury to have found that the place of presentment was only outside of Cuba. The jury finding that payment could be anywhere did not change the situs of this debt from Chase in Cuba while it functioned there. It only created an option for plaintiff to collect the debt elsewhere prior to the confiscation. Although it is true, as asserted by plaintiff, that the parent bank is ultimately liable for the obligations of the branch, *Sokoloff v. National City Bank of New York*, 130 Misc. 66, 224 N.Y.S. 102 (Sup.Ct.N.Y.Co.1927) aff'd 223 App.Div. 754, 227 N.Y.S.907, aff'd 250 N.Y. 69, 164 N.E. 745 (1928), such a liability does not alter the situs of the debt. When the branch's liability is extinguished, as under the facts herein, the parent is relieved as well.

Accordingly, this court holds that the judicial self-limiting act of state doctrine applies herein as the confiscation of plaintiff's funds was an official act of a sovereign government fully executed within its own jurisdiction and whose validity this court must refuse to inquire into, thereby implicitly giving the act extra-territorial effect. A confiscatory decree, the very archetype of an act of state, *Republic of Iraq v. First National City Bank*, supra, may not be reviewed, if fully executed, even if the property later comes into the jurisdiction of the forum and will necessarily be given effect regardless of how repugnant the result may be to the public policy of the forum. *Banco Nacional de Cuba v. Sabbatino* supra.

In view of the above, it is unnecessary for the Court to consider the effect of the subsequent nationalization of the Chase

branches, or the possible applicability of the New York Banking law, sec. 138(1) (McKinney's 1971). The Court notes in passing the assertion by plaintiff that the holding in *Banco Nacional de Cuba v. Chase Manhattan Bank, N.A.*, 61 Civ. 4663 (1980) is *res judicata* without merit. The acquisition of a "Bernstein" letter by the defendants in that case applies only to the holding therein.

Judgment is for the defendant as a matter of law and based upon the jury findings.

TRANSLATION OF CERTIFICATE OF DEPOSIT (R. 894.)

No. FD1877, Marianao, Havana, Cuba, November 7, 1958
$66,440.16

THE CHASE MANHATTAN BANK

Marianao, Havana, Cuba

Hereby affirms that Rosa Maria Manas Y Pineiro on this date has constituted in this Bank in the nature of a fixed term deposit the amount of Sixty-Six Thousand Four Hundred Forty and 16/100 national currency, which shall be returnable upon the prior presentment of this document on April 7, 1959 plus interest at three per cent yearly (3%), it being understood that the referred to deposit is not transferable nor negotiable in any manner whatsoever and may only be returned to the depositor.

THE CHASE MANHATTAN BANK

(s) (Illegible)
Authorized signature

(s) (Illegible)
Assistant Administrator

CGZ The following dry mark appears several times:

LETTER FROM CHASE'S FORMER CUBAN BRANCH TO CHASE IN NEW YORK DATED SEPTEMBER 10, 1959 (R. 52a-53a.)

THE CHASE MANHATTAN BANK

Habana, Cuba
September 10, 1959

Mr. Walter E. Rutherford
Assistant Vice President
Main Office

Re: Ministry for Recovery of Misapplied Governmental Funds

Dear Walter:

Further to our letter of July 31, 1959, the subject Ministry has instructed us to close a number of frozen accounts and to remit the proceeds to them through a Manager's check to their order. The balances at the four branches in this group of accounts which we have lost is as follows:

Havana Branch	$3,915.73
Vedado Branch	8,423.76
Marianao Branch	279,656.64
Amistad Branch	7,557.28
Total	$299,553.41

In this group of accounts there are a number of time deposits and savings accounts that have been closed without the return to us of the time deposit certificates or the savings account passbooks. At present we do not know where these certificates or passbooks are and although we don't think that they will be presented for negotiation or redemption in your area, we thought

Letter from Chase's Former Cuban Branch to Chase in New York
Dated September 10, 1959

in any case it would be advisable to give you a list of such documents for the protection of all concerned. This is the list:

Time Deposit Certificate Number	Savings Account Passbook Number	Holder of the Account	Balance
VEDADO BRANCH:			
	P2-5717	Elisa Planas Ramirez	$5,050.10
MARIANAO BRANCH:			
	P3-3797	Rosa Maria Manas Pineiro	$10,544.27
FD-1885		Rosa Maria Manas Pineiro	13,140.00
FD-1634		Rosa Maria Manas Pineiro	100,000.00
FD-1635		Rosa Maria Manas Pineiro	40,756.31
FD-1641		Rosa Maria Manas Pineiro	7,000.00
FD-1877		Rosa Maria Manas Pineiro	66,440.16
		Total	$237,880.74
AMISTAD BRANCH:			
	P4-0526	Fernando Casillas Lumpuy	$3,092.24

Both the closing of the accounts as requested by the Ministry and the delivery of the Manager's checks to them was referred to our lawyers, who gave their approval to the legality of the

Letter from Chase's Former Cuban Branch to Chase in New York
Dated September 10, 1959

action under present Cuban laws.

Sincerely yours,

Thomas M. Findlay
Vice President

UG/zgp

DECISION OF THE COURT OF APPEALS OF THE STATE OF NEW YORK DENYING MOTION FOR REARGUMENT DATED JUNE 7, 1984

1 Mo. No. 475

Esther Garcia Manas Perez, as Administratrix &c. of Rosa Maria Manas Y Pineiro, Deceased,

Respondent,

vs.

The Chase Manhattan Bank, N.A.,

Appellant.

Motion for reargument denied with twenty dollars costs and necessary reproduction disbursements.

Decision. Court of Appeals. June 7, 1984.

No. 84-365

Office - Supreme Court, U.S.
FILED
OCT 5 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ESTHER GARCIA MANAS PEREZ, as Administratrix of the Estate of Rosa Maria Manas Y Pineiro, Deceased,

Petitioner,

—v.—

THE CHASE MANHATTAN BANK, N.A.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF RESPONDENT IN OPPOSITION

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Question Presented

When a foreign government confiscates a deposit made at a foreign branch of a United States bank by a foreign national, which deposit is collectible where the foreign branch is located and operating, is the bank insulated from double liability for such deposit by reason of the act of state doctrine?

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J. Zeevi & Sons, Ltd. v. *Grindlays Bank (Uganda) Ltd.*, 37 N.Y.2d 220, 371 N.Y.S.2d 892, *cert. denied*, 423 U.S. 866 (1975) 9, 10

IN THE

Supreme Court of the United States

October Term, 1984

No. 84-365

ESTHER GARCIA MANAS PEREZ, as Administratrix of the Estate of Rosa Maria Manas Y Pineiro, Deceased,

Petitioner,

—v.—

THE CHASE MANHATTAN BANK, N.A.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF RESPONDENT IN OPPOSITION

This brief is submitted by respondent, The Chase Manhattan Bank, N.A. ("Chase"), in opposition to the petition of Esther Garcia Manas Perez ("petitioner") for a writ of certiorari to the Court of Appeals of the State of New York.

Statement of the Case

This action involves an attempt by a depositor at one of Chase's former branches in Cuba to impose on Chase double liability for her deposits which were confiscated by the Cuban government in 1959. As recognized by the New York Court of Appeals, it presents a classic case for

the application of the act of state doctrine as developed by this Court: a) the debt had its situs in Cuba at the time of confiscation and was thus subject to the jurisdiction of the Cuban government; b) the debt was confiscated by the Cuban government; and c) the confiscation extinguished the debt owed by Chase to its depositor. To have failed to give effect to the act of the Cuban government would have been repugnant to long-established legal precedent and would have resulted in the inequitable imposition of double liability on Chase.

Facts

This action seeks recovery of the principal amount of five deposits which were made by Rosa Maria Manas Y Pineiro ("plaintiff") at the former branch of Chase at Marianao, Cuba, on various dates in 1958 and were evidenced by certificates of deposit.

The certificates evidencing the subject deposits were issued by the Marianao branch on the dates indicated at the top of each certificate: May 26, May 26, June 10, November 7, and December 9, 1958 (R35a-R40a).* Each certificate was issued to plaintiff upon deposit with that branch of currency in the face amount indicated. The obligation represented by each certificate is described in the Spanish language and said to be in "moneda nacional" (R23a-R27a). The certificate matured on the sale indicated thereon: May 26, May 26, June 7, April 7, and June 9, 1959. The certificates were never presented to any of Chase's Cuban branches for payment (R127).

In September, 1959, pursuant to Cuban law (R41a-R51a, R54a-R61a), the Cuban government by its Ministry

* Numbers in parentheses prefixed by the letter "R" refer to the record in the state court. Numbers in parentheses prefixed by the letter "A" refer to the appendix annexed to Perez' petition.

for the Recovery of Misappropriated Funds (the "Ministry") directed Chase's Cuban branches to close certain accounts belonging to former government officials and their families and to remit the balances therein to the Ministry. Chase complied under compulsion of law (R434-R436). Among those accounts were the subject deposits of plaintiff, a Cuban citizen, who was the wife of a cabinet minister in the Batista government. Pursuant to the Ministry's instructions, and after Chase consulted with legal counsel in Cuba (R52a-R53a), plaintiff's accounts at the Marianao branch were closed, and the balances transferred as directed. On September 17, 1960, Chase's Cuban branches were nationalized pursuant to Cuban law (R63a-R71a). All branch assets were taken, and liabilities assumed, by the Cuban government. Thereafter, Chase ceased to have any control of its branches which continued to operate as part of the national bank of Cuba.

In January, 1974, plaintiff first made demand on Chase in New York for payment of the deposits (R82a). By letter dated February 14, 1974, Chase refused payment (R83a). Plaintiff commenced this action in Supreme Court of the State of New York, New York County, on July 14, 1974.

Proceedings and Decisions Below

The action was tried before a jury, and the jury concluded that: (a) the certificates were repayable in U.S. dollars; (b) the certificates could be presented for payment at any branch of Chase anywhere in the world, including in New York and Cuba; and (c) the Cuban government confiscated plaintiff's deposits which had been made in Chase's Marianao branch.

The trial court rendered its decision on December 3, 1980, directing entry of judgment for Chase as a matter of law and based on the jury findings (A41a-A50a). The

trial court held that (a) the subject desposits had their situs in Cuba in 1959, (b) the subject deposits were confiscated by the Cuban government in 1959, and (c) Chase was relieved of liability by reason of the confiscation, the validity of which could not be questioned because of the act of state doctrine.

The Appellate Division of the New York Supreme Court reversed, determining (a) without citation of any authority, that the act of state doctrine applied to intangible property only "where the obligation is found to be situated *exclusively* within the foreign State;" (b) contrary to the jury's finding that the deposits were confiscated, Chase's payment of the deposit balances to the Cuban government was a "voluntary" act; and (c) without citation of any authority, that the act of state doctrine should not be applied to relieve a bank of obligations owed by its branches to depositors (A24a-A40a).

The Court of Appeals of the State of New York reversed, and directed that the trial court's judgment for Chase be reinstated (A1a-A21a). The Court set forth the rule for determining the situs of a debt as follows:

> For purposes of the Act of State doctrine, a debt is located within a foreign State when that State has the power to enforce or collect it. Since *Harris* v. *Balk,* the power to enforce or collect a debt has been dependent on the presence of the debtor. If the debtor is present in the foreign State *and the debt is payable there,* the foreign sovereign then has power to enforce or collect it, and a confiscation of that debt amounts to a seizure of property within that sovereign's borders. (A7a-A8a) (citations and footnote omitted) (emphasis added).

The Court rejected the Appellate Division's conclusion that the situs of plaintiff's deposits was not in Cuba because

the debt was not payable exclusively in Cuba. The Court said:

> The fact that Chase's debt to Manas was not exclusively payable in Cuba, but could in addition have been paid in other countries, does not affect this result. Manas bargained for and received the right to collect the debt from Chase at any of its branches throughout the world. While the debt contemplated alternate place of payment and thus had multiple situs, because it constituted but a single obligation to pay, payment at one of the places chosen for performance extinguished the debt at all of its situses. (A9a)

The Court determined that the property taken by the Cuban government was within its borders for purposes of the act of state doctrine. The Court noted:

> At the time the Cuban government confiscated Manas' deposits in September, 1959, the debtor (Chase) was present in Cuba. Its Cuban branches were open and operating under Cuban authority, and the debt owed by Chase to Manas—as the jury found—was payable at any Chase bank in the world including the Marianao branch where it was confiscated. (A8a)

Accordingly, the Court found that the acts of the Cuban government were beyond its review by reason of the act of state doctrine. The Court noted:

> Only when a debt or other obligation is not payable at all in the confiscating State would the Act of State doctrine be inapplicable. In such situations, the foreign sovereign has no power to enforce or collect the debt. Here, however, as the jury found, Chase's debt to Manas was payable in Cuba, giving Cuba the jurisdiction to collect and enforce it, which

> the Cuban government exercised. By reason of the Act of State doctrine, the legitimacy of the confiscation is beyond our review. (A9a) (citations and footnote omitted).

Given its inability to review the legitimacy of the confiscation, the Court found that Chase's payment of the full amount of its debt to the Cuban government extinguished its debt to plaintiff, concluding:

> Where, as here, Chase paid over the full amount of its debt pursuant to the direction of the Cuban government, a direction which under the Act of State doctrine is beyond our review, Chase is relieved of liability on any subsequent demand by Manas for the funds. (A8a) (citations omitted).

The Court went on to note:

> Manas herself surely could not have redeemed the certificates of deposit in Cuba and subsequently received payment on those same certificates at a Chase branch in another country. Chase's debt to Manas was satisfied by payment to the Cuban government in response to its confiscation of Manas' accounts, and at that point the debt, wherever else it had been payable, was extinguished. (A9a).

The Court found it unnecessary to reach separate questions of New York law (A9a). However, application of New York law, and particularly its choice of law rules, would have resulted in an identical conclusion as New York law is totally consistent with the act of state doctrine.

Petitioner moved for reargument of the New York Court of Appeals' decision, and that motion was denied (A55a).

The Petition for a Writ of Certiorari Should Be Denied Because the New York Court of Appeals Correctly Applied the Act of State Doctrine and There Is No Conflict Between the New York Court of Appeals and Any Federal Court Regarding the Proper Application of the Act of State Doctrine to the Confiscation of a Debt.

Petitioner has failed to put forth a single cogent reason why a writ of certiorari should be issued. The essential issue in the New York Court of Appeals was whether the deposits had situs in Cuba for if such were the case, there was no dispute that the Cuban government acted under color of law in seizing them and terminating Chase's liability. The decision of the New York Court of Appeals herein as it relates to situs and other aspects of the act of state doctrine is consistent with the longstanding decisions of the federal courts and correct in its analysis and application of the doctrine as established and developed by those decisions.

A. Both State and Federal Courts Have Consistently and Uniformly Determined That the Situs of a Debt for Purposes of the Act of State Doctrine Is Within a Foreign State When That State Has the Power to Enforce or Collect the Debt. The Doctrine Was Properly Applied by the Court of Appeals.

In *Underhill* v. *Hernandez*, 168 U.S. 250, 252 (1897), this Court set forth the classic statement of the act of state doctrine:

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to

> be availed of by sovereign powers as between themselves.

The act of state doctrine precludes courts in this country from inquiring into the legality or propriety of a foreign sovereign's confiscation of property carried out within that sovereign's borders. *First National City Bank* v. *Banco Nacional de Cuba,* 406 U.S. 759, 763 (1972); *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398, 437 (1964); *Oetjen* v. *Central Leather Co.,* 246 U.S. 297, 303 (1918); *Ricaud* v. *American Metal Co.,* 246 U.S. 304, 309 (1918). It has been applied to the confiscation of intangibles such as bank balances collectible in a foreign state. *Trujillo-M* v. *Bank of Nova Scotia,* 51 Misc. 2d 689, 692 (Sup. Ct. N.Y. Co. 1966), *aff'd,* 29 A.D.2d 847 (1st Dep't), *cert. denied,* 393 U.S. 982 (1968).

The rule enunciated by the New York Court of Appeals with respect to the situs of a debt for purposes of the act of state doctrine (A7a-A8a) was reiterated by the Court of Appeals for the Second Circuit in its almost contemporaneous decision in *Garcia* v. *The Chase Manhattan Bank, N.A.,* 735 F.2d 645, 650 n.5 (2d Cir. 1984). In *Garcia,* the court said:

> For act of state purposes, "a debt is not 'located' within a foreign state unless that state has the power to enforce or collect it."

Id. at 650 n.5 (quoting *Menendez* v. *Saks & Co.,* 485 F.2d 1355, 1364 (2d Cir. 1973), *rev'd on other grounds sub nom. Alfred Dunhill* v. *Republic of Cuba,* 425 U.S. 682 (1976)). *See also Vishipco Line* v. *The Chase Manhattan Bank, N.A.,* 660 F.2d 854, 862 (2d Cir. 1981), *cert. denied,* 459 U.S. 976 (1982); *United Bank, Ltd.* v. *Cosmic International, Inc.,* 542 F.2d 868, 873 (2d Cir. 1976). *Accord Republic of Iraq* v. *First National City Bank,* 353

F.2d 47, 51 (2d Cir 1965), *cert. denied,* 382 U.S. 1027 (1966) (The act of state doctrine is inapplicable to extra-territorial acts of a foreign sovereign). In order for a foreign state to enforce or collect a debt, the foreign state must have jurisdiction over the debtor and the debt must be payable within the foreign state.

Moreover, the decision of the New York Court of Appeals is consistent with its recent decisions governing the act of state doctrine. In *Weston Banking Corporation* v. *Turkiye Garanti Bankasi,* 57 N.Y.2d 315 (1982), and *J. Zeevi & Sons, Ltd.* v. *Grindlays Bank (Uganda) Ltd.,* 37 N.Y.2d 220, *cert. denied,* 423 U.S. 866 (1975), the New York Court of Appeals discussed the application of the act of state doctrine to regulations prohibiting certain payments under either a letter of credit or a promissory note. Neither *Weston* nor *Zeevi* involved, as the present case does, the payment of an obligation, evidenced by such an instrument, to a government, pursuant to government order and in satisfaction of such obligation. But most significant, in both cases the parties had agreed that payment of the obligation would only be made at banks in New York, and, therefore, the Court determined that the debt did not have a situs in the nation issuing the restrictive regulations and was consequently not subject to its acts. For example, in *Weston,* the Court stated:

> We would add that the note requires payment to be made at Chemical Bank in New York City and designates New York law to be controlling.
>
> We conclude that on these facts the Act of State doctrine does not constitute a defense to plaintiff's action to recover on this note. A debt is not located within a foreign State unless it had the power at the instance of an interested party to enforce or collect it.

57 N.Y.2d at 324 (citing *J. Zeevi & Sons, Ltd.* v. *Grindlays Bank (Uganda) Ltd.*, 37 N.Y.2d at 228; *Republic of Iraq* v. *First National City Bank*, 353 F.2d 47, 51 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966)).

In addition, the Second Circuit and the New York Court of Appeals in this case (A8a-A9a) have recognized that the rule for determining the situs of an intangible for purposes of the act of state doctrine is consistent with the traditional rule announced in *Harris* v. *Balk*, 198 U.S. 215 (1905), that the situs of a debt depends upon jurisdiction over the debtor.* *Garcia* v. *The Chase Manhattan Bank, N.A.*, 735 F.2d 645, 650 n.5 (2d Cir. 1984); *Vishipco Line* v. *The Chase Manhattan Bank, N.A.* 660 F.2d 854, 862 (2d Cir. 1981), *cert. denied*, 459 U.S. 976 (1982); *United Bank Ltd.* v. *Cosmic International, Inc.*, 542 F.2d 868, 873 (2d Cir. 1976).

Petitioner's reliance on *Allied Bank International* v. *Banco Credito Agricola de Cartago*, 733 F.2d 23 (2d Cir. 1984), *rehearing granted* (July 3, 1984), *aff'g*, 566 F. Supp. 1446 (S.D.N.Y. 1983), and *Libra Bank Ltd.* v. *Banco Nacional de Costa Rica, S.A.*, 570 F. Supp. 870 (S.D.N.Y. 1983), as evidence of the confused and inconsistent state of the law is misplaced. The decisions in *Allied* and *Libra* are neither confusing nor inconsistent. In *Allied*, the court concuded that the situs of the debt was not determinative, holding that the acts of the Costa Rican government should be given effect because of principles of comity and regardless of the situs of the debt. 733 F.2d at 26. In *Libra*, the district court was dealing with promissory notes payable exclusively at a bank in New York and

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* The New York Court of Appeals recognized that, although another aspect of *Harris* v. *Balk* has been overruled by *Schaffer* v. *Heitner*, 433 U.S. 186 (1977), the debt-situs holding in *Harris* remains unimpaired (A7a).

was thus constrained to find their situs solely in New York. 470 F. Supp. at 881, 882.

As noted above, the test for determining the situs of a debt for purposes of the act of state doctrine, established by a long line of precedent, is both clear and unchallenged. The situs of a debt is within a foreign state when that state has the power to enforce or collect the debt. A foreign state has the power to enforce or collect the debt when both the debtor is present within the foreign state and the debt is payable there. The facts herein meet all criteria for the application of the act of state doctrine to the confiscation of the subject debt. There is no confusion with respect to the relevant principles or their application by the New York Court of Appeals in the present case. There is no reason for this Court to take time to consider the matter further.

B. The Decision of the New York Court of Appeals Is Consistent With the *Garcia* Decision.

Contrary to petitioner's contention (Petition at 10), the decision of the New York Court of Appeals is entirely consistent with the almost contemporaneous decision of the Second Circuit in *Garcia* v. *The Chase Manhattan Bank, N.A.*, 735 F.2d 645 (2d Cir. 1984). Petitioner's allegation that *Garcia* is "factually indistinguishable" from *Perez* is simply erroneous.

The Second Circuit's amended opinion in *Garcia* is factually distinguishable from *Perez* in one fundamental respect.* The Second Circuit determined in *Garcia* that

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* The original opinion of the Second Circuit in *Garcia* ignored the previous decisions regarding the situs of a debt for purposes of the act of state doctrine. Chase moved for reargument, with suggestion for rehearing *en banc*, and referred the Court to the New York Court

(footnote continued on following page)

Chase had agreed to insure plaintiff's deposits against all political and legal risks which the future might hold, including confiscation by the Cuban government. The Second Circuit found:

> The purpose of the agreement between Chase and Dominguez and Garcia was to ensure that, no matter what happened in Cuba, including seizure of the debt, Chase would still have a contractual obligation to pay the depositors upon presentation of their CDs.

Id. at 650 (footnote omitted).

In the present case, however, no such contractual undertaking on the part of Chase existed. Indeed, petitioner argued before the New York Court of Appeals that such an extraordinary agreement should be found, and the Court rejected that argument.

In *Garcia,* the Second Circuit conceded that "if the situs of Chase's debt to Garcia were in Cuba, the Cuban government could validly seize it," *Id.* (footnote omitted), but concluded that the act of state doctrine was not applicable because of the unique contractual undertaking between Chase and Garcia to insure Garcia against all political and legal risks. The Court noted:

> Today's decision is predicated on Chase's contractual undertaking to ensure the safety of . . . Garcia's money by agreeing to honor its obligations

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(footnote continued from preceding page)

of Appeals' decision in *Perez,* believing that the two cases were factually indistinguishable. The Second Circuit disagreed with Chase's interpretation of the facts in *Garcia* and its amended opinion vividly illustrates the factual differences between the two cases. Based on the amended opinion, Chase's motion for reargument, with suggestion for rehearing *en banc,* was denied, and Chase did not seek a writ of certiorari.

> in dollars at any of its branches. . . . Chase cannot use the act of state doctrine as a defense because the doctrine is not implicated.

Id. at 651. Once the Second Circuit had determined that the unique contractual undertaking between Chase and Garcia existed, the act of state doctrine was no longer involved, and the situs of the debt became irrelevant.

Indeed, the New York Court of Appeals could have cited *Garcia* as authority for its holding that under the act of state doctrine, the situs of Chase's debt to petitioner was in Cuba and the Cuban government could validly seize it. The Second Circuit stated:

> If the foreign state can enforce or collect the debt, the act of state doctrine will apply to seizure of the debt because the doctrine seeks to avoid challenging the completed acts of foreign governments.

Id. at 650 n.5.

Rather than a tenuous distinction, as suggested by petitioner, the distinction between *Perez* and *Garcia* is fundamental. Absent an agreement to insure against political and legal risks, the act of state doctrine is not only implicated, but plays a determinative role. Accordingly, the differing results in *Perez* and *Garcia* can be readily explained by the radical difference between the contractual undertakings found to have existed between the respective plaintiffs and Chase.

Conclusion

Petitioner is unable to demonstrate any inconsistency between the decision of the New York Court of Appeals herein and any decision of a federal court. Moreover, the rule adopted by the New York court for determining the situs of a debt for purposes of the act of state doctrine follows a long line of precedent and raises no new important federal question. As a result, review by this Court is unnecessary, and the petition for a writ of certiorari to the Court of Appeals of the State of New York should be denied.

Dated: October 4, 1984

Respectfully submitted,

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APPENDIX A

Rule 28 Listing of Parents, Subsidiaries and Affiliates

The Chase Manhattan Bank, N.A., is 100% owned by The Chase Manhattan Corporation. A comprehensive list of subsidiaries and affiliates, including wholly-owned entities, is maintained by The Chase Manhattan Corporation and is considered confidential. If the Court believes it necessary, The Chase Manhattan Bank, N.A., will supply such a list but would request that the list be kept confidential. The following is a list of the subsidiaries and affiliates of The Chase Manhattan Corporation as listed in its most recent annual report:

Domestic Locations

Chase Bank International
Chase Commercial Corporation
Chase Econometric/Interactive Data Corporation
Chase Home Mortgage Corporation
Chase Investors Management Corporation
Chase Manhattan Bank, N.A., The
Chase Manhattan Bank (U.S.A.), N.A., The
Chase Manhattan Capital Markets Corporation
Chase Manhattan Financial Services, Inc.
Chase Manhattan Government Securities, Inc.
Chase Manhattan of California Trust
Chase Manhattan of Utah
Chase Manhattan Industrial Bank
Chase Manhattan Overseas Banking Corporation
Chase Manhattan Service Corporation
Chase Manhattan Treasury Corporation
Chase National Corporate Services, Inc.
Chase T/C Service Corporation
Computer Power, Inc.

Chase Trans-Info, Inc.
Rose & Company Investment Brokers, Inc.

Overseas Locations

Europe

Subsidiary and Associate Banks

Banque de Commerce, S.A.
Banque de Reescompte et de Placement (B.A.R.E.P.)
Chase Bank, A.G.
Chase Bank (Ireland) Ltd.
Chase Bank and Trust Co. (C.I.), Ltd.
Chase Manhattan Bank (Austria) A.G.
Chase Manhattan Bank Luxembourg, S.A.
Chase Manhattan Bank, OY
Chase Manhattan Bank (Switzerland)
Chase Manhattan Limited
Chase Manhattan, S.A.
Libra Bank Limited
Nederlandse Credietbank N.V.

Subsidiary and Associate Companies

Chase Trade Finance, Ltd.
Chasefin-Chase Finanziaria, S.p.A.
Financiere d Investissements et de Construction Immobiliere (F.I.C.I.)
Interactive Data GmbH

Middle East and Africa

Subsidiary and Associate Banks

Chase Bank Cameroon, S.A.
Chase Merchant Bank Nigeria Limited
Chase National Bank (Egypt) S.A.E., The
Saudi Investment Banking Corporation

Asia and Australia

Subsidiary and Associate Banks

Amanah Chase Merchant Bank Berhad
Chase Manhattan Asia Limited
Chase Manhattan Trust Company (Hong Kong) Ltd.

Subsidiary and Associate Companies

Alliance Acceptance Co. Limited
Alliance Holdings Limited
Chase-N.B.A. Group Ltd.
Chase-N.B.A. Securities, Ltd.
Diamond Lease Company Ltd.
P.T. Chase Leasing Indonesia

Western Hemisphere

Subsidiary and Associate Banks

Banco Atlantida, S.A.
Banco de Investimentos Lar Brasileiro, S.A.
Banco del Comercio
Banco del Comercio (Panama), S.A.
Banco Lar Brasileiro, S.A.
The Chase Manhattan Bank of Canada
Chase Manhattan Trust Cayman Ltd.
The Chase Manhattan Trust Corporation Limited

Subsidiary and Associate Companies

Arrendadora Cremi, S.A.
Chase Manhattan Leasing Canada, Ltd.
Financeira Lar Brasileiro, S.A.
Inversiones Atlantida, S.A.